

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

480

TRANSCRIPT OF RECORD

United States Court of Appeals for the
District of Columbia

OCTOBER TERM, 1940.

No. 7797

729

NU CAR CARRIERS, INC., APPELLANT,

vs.

WILLIAM F. TRAYNOR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

LIBRARY

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THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1940.

No. 7797

NU CAR CARRIERS, INC., (A CORPORATION),
APPELLANT,

vs.

WILLIAM F. TRAYNOR, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

A. District Court of the United States
For the District of Columbia

LAW No. 89233

WILLIAM F. TRAYNOR, *Plaintiff*

vs.

NU CAR CARRIERS, INC. (a corporation) *Defendant*

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the
United States for the District of Columbia, at the
City of Washington, in said District, at the times
hereinafter mentioned, the following papers were
filed and proceedings had, in the above-entitled
cause, to wit:

1 *Declaration*

Filed August 2 - 1937

In the District Court of the United States For the District
of Columbia
(Holding a Law Court)

LAW No. 89233

WILLIAM F. TRAYNOR, 3315 North Palethrope Street, Phila-
delphia, Pennsylvania *Plaintiff*

vs.

NU CAR CARRIERS, INC. (a corporation) 1 Franklin Street
Alexandria, Virginia *Defendant*

The plaintiff, William F. Traynor, sues the defendant,
Nu Car Carriers, Incorporation, a corporation doing busi-
ness in, among other places, the District of Columbia and
in the state of Maryland, for personal injuries and damages
sustained by the plaintiff due to the carelessness, reckless-

ness and negligence of the defendant for that heretofore, to wit, on the 17th day of October, 1936, the plaintiff was propelling his automobile in the state of Maryland on Conowingo Road in a southerly direction towards Baltimore on a certain point of said Conowingo Rd., to wit, on the right side of Conowingo Road and near its intersection with Broadway Avenue, in the state of Maryland; and at the same time and place aforesaid, the defendant, by its agent and driver was propelling and operating its motor vehicle, to wit, Ford Trailer-truck in a northerly direction towards Philadelphia on Broadway Avenue in or near the town of Belair, Maryland; and was approaching the point where plaintiff was then and there operating and propelling his automobile; and there were in force in the state of Maryland on the same date certain traffic regulation known and designated as follows:

Section 194, Subtitle (1), General Provisions under the heading of Reckless Driving.

“No person shall operate a motor vehicle of any kind, as defined in this subtitle, over any public highway of the State recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic and use of the highway, or so as to endanger the property and life or limb of any person. * * *”

2 Section 194, Subtitle (3), Speed of Other Vehicles, under the heading of Speed of Vehicles with Commercial Body.

“No motor vehicle equipped with a commercial body, the weight of which, including the body and load, is greater than three (3) tons shall be operated at a rate of speed greater than twenty-five miles per hour under any circumstances.”

Section 195. When Speed is to be Reduced.

“Upon approaching any person walking in the traveled portion of any public highway or a horse or any animal being led, ridden or *driven* thereon, or a crossing of intersecting public highways, or a bridge, or a sharp turn, or a curve or steep descent, and also in passing such person or such horse or other animal and in traveling such crossing, bridge, turn, curve or descent, the person operating a motor

vehicle or motor-cycle shall have the same under control and shall reduce its speed to a reasonable and proper rate.”

Part VI, Rules of the Road, under the heading of Keeping to Right—Rules for Passing. (Section 209)

“All vehicles, motor, horse-drawn or otherwise, being driven upon the highway of this state shall at all times keep to the right of the center of the highway upon all highways of sufficient width, except upon streets or roads where traffic is permitted to move in one direction only, and except when overtaking and passing another vehicle, and unless it is impracticable to travel on such side of the highway, and in rounding curves shall keep as far to the right of the center of the road as reasonably possible.”

Whereby it became and was the duty of the defendant, acting as aforesaid, to drive and propel its said motor vehicle in accordance with the traffic regulations as aforesaid and not to violate each or any of them; to keep a proper lookout for the plaintiff who was then and there operating with due care and prudence his said automobile as aforesaid at the time and place aforesaid; to keep and propel its said Ford Trailer-truck at a speed not greater than was reasonable and prudent having due regard to the circumstances and traffic conditions then and there existing; and to keep its said Ford Trailer-truck under such emergency control so as to be able to stop the same when said defendant, acting as aforesaid, saw or, by the exercise of reasonable care, prudence and caution, should have seen the plaintiff in a position of peril and danger so as to avoid injuring the plaintiff.

Yet plaintiff avers that defendant acting as aforesaid, notwithstanding and in disregard of the duties imposed upon it and in violation of the regulations heretofore set forth, carelessly, recklessly and negligently operated its

3 said Ford Trailer-truck, in that said defendant acting as aforesaid drove and propelled its said Ford

Trailer-truck at a greater speed than was reasonable and prudent under the circumstances and traffic conditions then and there existing and without having due regard to the width, traffic and use of the highway; in that the said defendant acting as aforesaid, drove and propelled its said Ford Trailer-truck which was more than three tons in

weight at a speed greater than twenty-five miles per hour; in that said defendant at the time and place aforesaid, carelessly, recklessly and negligently failed to keep under proper control and to reduce the speed of its said Ford Trailer-truck to a reasonable and proper rate of speed when rounding the curve of said Broadway Avenue in the state of Maryland; in that said defendant carelessly, recklessly and negligently failed to keep its said Ford Trailer-truck as far as reasonably possible on the right side of the center of the roadway when rounding said curve of Broadway Avenue as aforesaid; defendant drove truck on wrong side of roadway; that defendant carelessly, recklessly and negligently drove and propelled its said Ford Trailer-truck at a greater speed than was reasonable and prudent and without due regard to the circumstances and traffic conditions then and there existing upon approaching the point where plaintiff was then and there crossing; in that said defendant acting as aforesaid, failed to keep a proper lookout for the plaintiff who was then and there operating his said automobile with due care and caution at the time and place aforesaid; and in that said defendant carelessly, recklessly and negligently failed to slacken the speed of its said Ford Trailer-truck and failed in like manner to keep it under such control so that said defendant could stop the same in due time to prevent its said Ford Trailer-truck from striking and colliding with the plaintiff's automobile; and in that defendant acting as aforesaid, carelessly, recklessly and negligently failed to stop its said Ford Trailer-truck when it saw or, in the exercise of reasonable care, prudence and caution, should have seen the plaintiff in a position of great peril and danger and to stop the same in due time to avoid its Ford Trailer-truck from colliding with plaintiff.

Plaintiff further avers that as a result of the carelessness, recklessness and negligence of the defendant acting by its agent and driver, the Ford Trailer-truck of the defendant

4 was carelessly, recklessly and negligently caused to strike and collide with the automobile of the plaintiff with great force and violence causing said plaintiff to be hurled out from his seat and thrown with great force and violence against the door, side, floor, steering wheel and other parts of the interior of plaintiff's said automobile.

Whereby the plaintiff avers that he was seriously and permanently injured and suffered a large swelling on the right side of his head causing mental confusion and severe attacks of vertigo; suffered numerous bruises, contusions and lacerations causing pains and edema of the back of his right hand with inability to close the same due to the pains and swelling; suffered severe pains in the left side of his chest due to bruised muscles and ribs which necessitated strapping; and suffered traumatic pleurisy of left side of his chest causing severe coughs with sharp and sticking pains therein; and plaintiff was caused to have bloody streaked sputum; suffered severe pain in lumbar region and sprained back which necessitated strapping, and severe pain in right thigh especially in inguinal region; and that the entire right leg was caused to be stiff and numb with resulting contusion and edema of muscles of the right thigh; suffered severe pain in the right hip down to the right knee thereby causing the motion of the right hip to be limited and painful; suffered pain in the coccyx necessitating him to remain in bed in a semi-sitting position for a considerable period of time; and suffered acute orchitis, edema and severe pain in the right testicle with increasing pain on changing his position in bed. Plaintiff further avers that because of these injuries he has been and will be incapacitated for a long time to come, to wit, hitherto; and that he was caused to be confined for a considerable period of time in the hospital and also at home where he will continue to be confined for a long time to come; and that in an effort to be healed and relieved of his said injuries and sufferings as aforesaid, he had incurred and will continue to incur great expenses for medical care, treatments, X-ray and attention; that he has been severely shocked and rendered severely sick, sore, lame and distressed for a long time to come, to wit, hitherto; that because of these injuries he was caused to and will in the future be caused to endure severe sufferings and

5 has suffered great loss of sleep; that his nervous system was permanently and severely shocked and shaken and he was otherwise internally hurt; that he was caused to undergo severe and painful treatments for a considerable period of time; that because of these injuries he suffered great loss of emoluments which he would have earned were it not for these injuries; and that he has been seriously injured and permanently incapacitated to perform

in his usual and efficient manner the duties in connection with his employment and is permanently crippled; plaintiff further avers that because of the violent collision between his automobile and defendant's Ford Trailer-truck, plaintiff's automobile was damaged beyond repairs, thereby he sustained damages for the full value of his automobile, to wit, Two Hundred Dollars, (\$200.00); all to the damage of the plaintiff in the sum of Fifteen Thousand Dollars, (\$15,000.00).

Wherefore the plaintiff brings this suit and claims damages of and from the defendant in the sum of Fifteen Thousand Dollars (\$15,000.00), besides costs of this suit.

EUGENIO M. FONBUENA

Attorney for Plaintiff

6

Motion for Security for Costs

Filed September 15 1937

* * *

Comes now the defendant by its Attorney, and moves the Court to require the plaintiff to furnish security for costs, as it is apparent on the face of the Declaration that said plaintiff is a non-resident of the District of Columbia and resides at Number 3315 North Palethrope Street, in the City of Philadelphia, in the State of Pennsylvania.

HENRY I. QUINN

Attorney for Defendant.

7

Plea

Filed September 20 1937

* * *

For a Plea to the Declaration filed herein the defendant admits its corporate existence, and admits that on the day alleged in the Declaration its agent was operating its truck at the place and in the direction alleged; it admits that the plaintiff's automobile was in collision with its truck at or about the place referred to in the Declaration; it denies each and every other allegation of the said Declaration not herein specifically admitted, except those as to the injuries and losses suffered and sustained by the plaintiff as to which it has no knowledge or information sufficient to form a belief.

HENRY I. QUINN

Attorney for Defendant

8

Filed Sep 22 1937

* * *

*Affidavit Supporting Inability to Furnish
Security for Costs*

William F. Traynor, a citizen of the United States and a resident of the city of Philadelphia in the State of Pennsylvania, being first duly sworn on oath deposes and says that he is the plaintiff in the above entitled cause; that he believes that he has a good cause of action against the defendant and is entitled to the redress he seeks; that he has no money nor other property or income and cannot borrow the money to deposit with the Clerk of this Court sufficient to cover security for costs, nor can he give security for the same; that this plaintiff since this accident happened has not except for a short time been able to return to work due to the injuries he sustained and is still unable to work and without employment; that he attempted to return to work but was unable to perform his duties as a riveter or any other duties that are required of one engaged in a vocation or trade in line with plaintiff's training and experience; but affiant says that if and when he could without endangering his health return and able to work for compensation reasonably sufficient to enable him to furnish security for costs, he will deposit with the Clerk of this Court an amount as the Court may deem proper and reasonable, to cover said security for costs.

WILLIAM F. TRAYNOR

PHILADELPHIA,

State of Pennsylvania, ss:

Subscribed and sworn to before me this 18th day of September, 1937

HARRY RUEGER

(Notarial Seal)

Notary Public.

My Commission expires Mar. 6, 1939.

9

Demand for Jury Trial

Filed October 18 1938

* * *

Plaintiff demands a trial by Jury of all the issues involved and presented in the above entitled cause.

EUGENIO M. FONBUENA

Attorney for Plaintiff

10

Amendment to Declaration

Filed November 7 1938

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*

Leave of Court first had and obtained, the plaintiff by his attorney hereby files the following amendments to his declaration heretofore filed herein.

1. Substitute the words "17th day of October, 1936," for the words "2nd day of February, 1937," which are contained in the fifth and sixth lines of the first page of plaintiff's declaration.

EUGENIO M. FONBUENA

Attorney for Plaintiff

11/8/38

Approved

LUHRING

J

11

Pretrial Order

Filed September 27 1939

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*

At the Pretrial hearing of the above entitled cause, the attorneys, and the parties hereto, being present in Court, admit and stipulate, as follows:

If otherwise admissible, the.....agrees that the.....may use in evidence, without formal proof

Suit by plaintiff for damages growing out of collision of automobile which he owned and drove, with truck of the defendant corporation, used for conveying automobiles, but which at the time of accident was not loaded. Respective automobiles were proceeding around a turn in the road at Bel Air, Maryland, going in opposite directions. Each side claims the other came over on the wrong side of the road. Plaintiff claims permanent injuries consisting of injury to head, spine and nervous shock.

It is stipulated that accident occurred about eight o'clock in the morning in daylight. Counsel will endeavor to stipulate prior to trial relative to applicable law in State of Maryland. Counsel for plaintiff will not stipulate with regard to records of the Police Department in Maryland, or with regard to records of Justice of the Peace at Bel Air.

Counsel will endeavor to stipulate with each other with regard to respective reports of their physicians.

It is Ordered: That the subsequent course of this action be controlled by the foregoing, unless modified at the trial thereof to prevent manifest injustice.

Dated September 27, 1939

BOLITHA J. LAWS
Pretrial Justice.

Attorneys authorized to act:

D. K. OFFUTT
E. M. FONBUENA

(signed) DORSEY K OFFUTT
(signed) E. M. FONBUENA
Plaintiff.

H. I. QUINN

(signed) H. I. Q.
Defendant.

.....
Third Party, *Plaintiff* or *Defendant.*

12 *Verdict and Judgment of Inquisition*

Filed October 26 1939

*

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*

This cause having come on for hearing on the 23rd day of October, 1939, before the Court and a jury of good and lawful persons of this district, to-wit:

Raymond L. Ehlers
Leonard W. Rice.
Isaac Iseman
Dorsey Griffith
Charles H. Bell.
William Janoff

George H. Hammer.
Julian D. Freeman
Stuart P. Heitmuller
Charles B. Miller.
James S. Brent
Morris W. Clark.

who, after having been duly sworn to well and truly ascertain the amount of damages sustained by the plaintiff in this cause as against defendant Nu Car Carrier Inc. and after this cause is heard and given to the jury in charge, they upon their oath this 26th day of October, 1939, say that they ascertain said damages to be in the sum of Seventy-five Hundred Dollars and no/100 (\$7500.00)

Wherefore, it is adjudged that said plaintiff recover of the said defendant the sum of Seventy-five Hundred and no/100 Dollars (\$7500.00), together with costs of this action.

CHARLES E. STEWART,
Clerk

by PAUL A. DAWSON
Asst. Clerk

by order of

GOLDSBOROUGH,
J.

13 *Motion of Defendant to Set Aside Verdict and Judgment in Favor of the Plaintiff Herein and for a New Trial*

Filed November 4 1939

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*

*

Now comes the defendant by its attorney, and moves the Court to set aside the verdict and judgment in favor of the plaintiff heretofore returned and entered against it and to grant a new trial. The grounds in support of this motion are as follows:

1. The verdict was contrary to the evidence and the law.
2. The verdict was grossly excessive.
3. The Court erred in overruling defendant's motion to withdraw a juror and declare a mistrial because of statements of the Court prejudicial to the defendant.
4. The Court erred in refusing to permit the defendant to establish the loss of the original exoneration statement or form signed by the plaintiff in refusing to permit the introduction of secondary evidence concerning the same.
5. Because of newly found and discovered evidence in the form of the original exoneration statement signed by the plaintiff, as shown by the affidavits of Henry S. Ambler, Henry I. Quinn and J. Newton Baker, hereto attached and prayed to be read as a part hereof.

And the defendant further moves the Court to stay the execution of the judgment herein pending disposition of this motion.

(Rule 62 (b) Federal Rules of Civil Procedure.)

HENRY I. QUINN
Attorney for Defendant.

14

Filed November 4 1939

STATE OF PENNSYLVANIA,

County of Philadelphia, ss:

I hereby certify that on the 27th day of October, 1939 before me the subscriber, a notary public, in and for the County of Philadelphia in the State of Pennsylvania, personally appeared Henry S. Ambler, and made oath in due form of law that he is a member of the law firm of Ambler and Ambler of Philadelphia, Pa.; that said law firm of Ambler and Ambler are successors to the law practice of Harry S. Ambler, Jr., who died on the 12th day of April, 1939; that said Harry S. Ambler, Jr., was counsel for the Auto Mutual Indemnity Co., of 1819 Broadway, New York City; that on or about October 20, 1936 there was referred to the said Harry S. Ambler, Jr., by the said Auto Mutual Indemnity Co. for investigation, a claim of William F. Traynor of 3315 North Palethorpe Street, Philadelphia, Pa., against the Nu Car Carriers, Inc., a corporation, an insured of the said Auto Mutual Indemnity Co.; that said claim grew out of an accident which occurred at Belair, Md., on October 17, 1936; that the said Harry S. Ambler, Jr., in the course of his investigation of said claim received from the Nu Car Carriers, Inc., certain papers in connection with this claim, included among which was an original of a driver's exoneration form purported to be signed by the said William Traynor and which is attached hereto; that the affiant, Henry S. Ambler's law firm as successor to Harry S. Ambler, Jr., took over all of the files of the said Harry S. Ambler, Jr., and that the attached driver's exoneration form has been in said file since about the time the investigation of said claim was undertaken; that the affiant further states that he was requested by Henry I. Quinn, attorney at law at Washington, D. C., of counsel for Nu Car Carriers, Inc., to search for the original exoneration form attached hereto; that the said file was searched and the affiant found that he had apparently sent the original of said exoneration form to the home office of the

15 Auto Mutual Indemnity Co., as he was unable to locate said form in his file; that he so informed the said Henry I. Quinn by long distance telephone on or about October 23, 1939, and on the same day wrote a letter to the same effect to the said Henry I. Quinn; that he further

informed the said Henry I. Quinn that he would send him a copy of the paper, which copy was in his file and did so in his letter of October 23, 1939.

The said Henry S. Ambler further swears and affirms that on the 27th day of October, 1939, he was requested by Edward A. Smith, attorney of Baltimore, Maryland, of counsel for Nu Car Carriers, Inc., to again search his file for the original of the exoneration form; that a new and more thorough search of the file in the presence of the said Edward A. Smith revealed that the original of the said exoneration form was in the file in the said case and the original of said form attached hereto is the paper which was found in said file, as related above.

sgd. HENRY S. AMBLER

Sworn to and subscribed before me this 27th day of October, A. D., 1939.

HENRIETTA M. WITTMANN

(Notarial Seal)

Notary Public

My commission expires Mar. 2, 1941.

DRIVER'S EXONERATION FORM

13

Date 10/17/36

To Whom it May Concern:

I hereby exonerate Driver George Emmett
of the McCar Carriers Company, from all blame
or negligence in connection with an accident involving the undersigned at

Beltair Maryland
on this date 10/17 1936

Witness

Signed Wm Traynor
Address 3315 E Palithorpe St
Phila. Pa

Address

(On back of Driver's Exoneration Form):

Driver of Car
William F. Traynor
3315 No. Palithorpe St
Phila. Pa
Pa. License 3 DS 69

Miss Elinor Allen
123 - R St. N.E
Washington
D.C.

Addres for next few days

17

Affidavit in Support of Motion

Filed November 4 1939

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*

*

District of Columbia, ss:

Henry I. Quinn, being first duly sworn, deposes and says that he is the attorney of record for the above named defendant; that he was originally retained by the Auto Mutual Indemnity Company, which had the coverage on the motor vehicle of the defendant involved in the accident herein; that in keeping with the practice of Insurance Companies copies of statements of witnesses and copy of exoneration form claimed to have been signed by the plaintiff herein, were sent to deponent by the said Insurance Company; that thereafter said Insurance Company went into bankruptcy and its affairs were taken over for liquidation by the Superintendent of Insurance for the State of New York; that thereafter the firm of Cook and Markell, attorneys at law, of Baltimore, Maryland, requested deponent to continue to represent the defendant herein, at the expense of said defendant, as the Superintendent of Insurance in New York refused to agree to pay his fee; that in preparation for the trial of this case deponent requested the said firm of Cook and Markell on October 2nd, to obtain from the Superintendent of Insurance of New York the original exoneration form signed by the plaintiff which was supposed to be in the files of the Auto Mutual Indemnity Company when it was taken over by the said Superintendent of Insurance; that on October 14th, 1939, the said firm of Cook and Markell reported to deponent that they had been advised by the New York Insurance Department, and the Chester office of the Nu Car Carriers, that the original exoneration form was not in their files and that they did not know where it could be located; that on October 23rd, 1939, having been informed that Harry S. Ambler, Jr., a member of the Bar of Pennsylvania, had had possession of said original exoneration form and had forwarded the same to the Home Office of the Auto Mutual Indemnity Company, after making a copy of the same, deponent called the office of Ambler and Ambler, successors to the said Harry S. Ambler, Jr., and requested them to search for the original exoneration form in their office because the Superintendent

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of Insurance of New York, had advised that it was not in the files taken over by him, and Henry S. Ambler, to whom deponent talked, searched the file which was in his office, or the office of his firm, and advised deponent that he could not find the original and their file indicated that they had sent it to the Home Office of the Auto Mutual Indemnity Company, and informed deponent that he would send him a copy of the paper which was in his file, and this copy deponent received on the morning of October 24th; that Edward A. Smith, connected with the firm of Cook and Markell, and a member of the Bar for the State of Maryland, went to Philadelphia, on the 27th day of October, A. D. 1939, and caused a further search to be made of the file in the office of the said firm of Ambler and Ambler, and said search revealed that the original of said exoneration form was in said file, and said original will be found attached to the affidavit of Henry S. Ambler; which is filed in support of the motion for new trial herein.

HENRY I. QUINN

Subscribed and sworn to before me this 4th day of November, A. D., 1939.

HELEN R. SASSCER

(Notarial Seal)

Notary Public, D. C.

19

Filed November 4 - 1939

District of Columbia, ss:

I, J. Newton Baker, of 1831 M Street, N. W., Washington, D. C., being first duly sworn depose and say that I have examined the signature, namely, Wm. Traynor written in pencil on a certain driver's exoneration form dated 10/17/36, and have made this examination in comparison with a genuine signature of William F. Traynor on an affidavit in the file of William F. Traynor, vs. Nu Car Carriers, Inc., Law No. 89,233, in the Clerk's office of the District Court of the United States for the District of Columbia, and my opinion and conclusion is that the penciled signature of Wm. Traynor written on the driver's exoneration form herein mentioned, is the writing and signature of the same person who write William F. Traynor on the aforementioned affidavit.

I have been a document examiner located here in Washington and have testified in the various Courts of the Dis-

trict of Columbia, Tennessee, West Virginia, Maryland, and Pennsylvania and base my opinion and my study and experience as a handwriting expert for more than twenty years, and I do not hesitate to say that my opinion is that this penciled signature of Wm. Traynor on the aforesaid exoneration driver's form is his authentic writing and signature. A photostatic copy of the original exoneration form is in the possession of counsel for the Nu Car Carriers, and is hereto attached.

J NEWTON BAKER (Signed)

Subscribed and sworn to before me this 3rd day of November, A. D., 1939.

HELEN R. SASSCER

(Notarial Seal)

Notary Public, D. C.

20

Order Overruling Motion

Filed December 11 1939

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Upon consideration of the motion to set aside verdict and judgment, and the motion for a new trial in the above entitled cause, it is by the Court this 11th day of December, 1939, Ordered, and Adjudged, that said motion be, and the same hereby is, overruled; and it is further

Ordered, that the undertaking herein on appeal to act as supersedeas is hereby fixed in the sum of Eight Thousand Five Hundred Dollars (\$8,500.00).

T. ALAN GOLDSBOROUGH

Justice

Approved as to form:

HENRY I. QUINN

Attorney for Defendant.

21

Notice of Appeal

Filed December 29 1939

*

*

*

Notice is hereby given this 29th day of December, 1939, that the defendant, Nu Car Carriers, Inc., hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 26th day of October, 1939 in favor of the plaintiff, William F. Traynor, against said Nu Car Carriers, Inc.

Order overruling motion for new trial signed December 11th, 1939.

HENRY I. QUINN

Attorney for Defendant.

Memoranda

December 29 - 1939.

Supersedeas bond (\$8500.00) on Appeal approved and filed.

February 5 - 1940.

Time for filing transcript of record in United States Court of Appeals extended from day to day to and including December 10, 1940.

22 In the District Court of the United States
For the District of Columbia

No. 89,233

WILLIAM F. TRAYNOR, SR., *Plaintiff,*

v.

NU CAR CARRIERS, INC., *Defendant.*

Transcript of Testimony

Filed December 9 1940

*

*

*

Washington, D. C.

Monday, October 23, 1939.

The above-entitled cause came on for hearing before Mr. Justice Goldsborough and a subsequently empaneled jury at 10 o'clock a. m.

Appearances:

D. K. Offutt, Esq., and

E. N. Fonbuena, Esq., for the plaintiff.

Henry I. Quinn, Esq., and

Richard W. Galiher, Esq., for the defendant.

Proceedings

After the examination of the jury panel upon their voir dire, a jury of twelve was duly empaneled and sworn, consisting of the following:

23	Raymond L. Ehlers	George H. Hammer
	Leonard W. Rice	Julian D. Freeman
	Isaac Iseman	Steuart P. Heitmuller
	Dorsey Griffith	Charles B. Miller
	Charles H. Bell	James S. Brent
	William Janoff	Morris W. Clark

(All witnesses in the case were ordered by the clerk to leave the hearing room.)

Mr. Offutt. If your Honor please, I notice that one witness has not gone.

Oh, he has gone now.

Shall I proceed?

The Court: Yes.

Opening Statement on Behalf of the Plaintiff

Mr. Offutt: May it please your Honor, and gentlemen of the jury, as I told you when you were examined on the voir dire, this is an accident case wherein William Traynor, the plaintiff, who sits here, has sued the Nu Car Carriers, Inc., and asks damages in the amount of \$15,000 for personal injuries which he received on October 17, 1936.

Now, we propose to show and will introduce to you competent, creditable, reliable testimony to show you gentlemen of the jury that on the early morning of October 17, 1936, this plaintiff was operating an automobile owned by
 24 his son, a Ford coupe, convertible coupe, in the direction of Washington; that he had left Philadelphia with his son as a passenger in the car in the early morning around 4:30 or 5 o'clock, intending to come to Washington to visit his two sisters who were employed here, and as he drove along the road, he traveled about 35 miles an hour prior to the time when he reached this point where the accident subsequently occurred.

As he came into Bel Air, we will show you that there is a sign and there was one on that particular morning which

advised him that he had passed the outskirts of Bel Air, and this sign said "25 Miles an Hour"; that he thereupon slowed down the speed of his car, so that he was going 18 to 20 miles an hour, and he was familiar with this road, having driven it many times, having worked in Washington and lived in Philadelphia and commuted back and forth in his automobile, and he knew there was a very sharp curve, and we will show you that he was just approaching this curve as he passed this sign which I referred to, and that there was another sign which had a cross on it, indicating the intersection or the curve.

So, as he was going 18 or 20 miles an hour, he reached this sharp curve, which at that time had a hedge on his right, and he was to make a right turn on this very sharp curve.

There was at that time a blinker light over there, and on the other side of the curve, coming toward Philadelphia, in the opposite direction from which he was then
25 going, we will show you that as a person approached that intersection and that sharp curve, there was a large sign which said "Dangerous Intersection" approximately 60 yards from the intersection. There was another sign which showed there was a sharp curve as one would come from the opposite direction toward this curve, and we will show you that at that time there was one of these large trucks, trailer trucks, which carry new automobiles or old automobiles, as the case may be—most of them are new automobiles, as the name indicates, Nu Car Carriers, Inc. This corporation owned this particular truck that was on the road at this time, and that the truck, with its trailer, was coming from the opposite direction.

We will show you that he was going at a higher rate of speed than it should have been going under those circumstances. It was a damp day, and it had rained the night before, and the road was moist, and, as this truck came into that corner, the plaintiff could not see the truck, or the truck could not see the plaintiff's car because of the high hedge. The trailer truck was to make a left-hand turn, and did in fact start its left turn, we will show you, and as the trailer truck started his left turn, we will show you that the trailer truck cut over on the left-hand side of the

road—that is, the truck went on the wrong side of the road, and as the trailer truck went on the wrong side of the road, the plaintiff, driving his car on the right-hand side of the road, was hugging inside of the right curve, and he
26 saw this trailer truck coming toward him. He pulled over as far as he could; he was almost over at the time, but he pulled over even further, but he was unable to avoid this truck, which ran into the left side of his Ford coupe.

We will show you that it knocked him unconscious, knocked a lot of things out of this little coupe out on to the road, stunned his son, who was in the car at the time, and turned the car partly around and shoved it down the road a bit.

We will show you that the truck driver then backed the truck up, so that the traffic could get by, pulled it over on the other side of the road, which is on the same side of the road where it should have been when this collision took place, and stopped his car there.

In the meantime the son of this plaintiff got out of the car and endeavored to help his father, who was still unconscious, and that he succeeded in bringing his father to consciousness. In the meantime a state trooper came and put his father on a stretcher in the state trooper's car and carried him to a doctor, who examined him for broken bones superficially, and then carried him back, while still on the stretcher, and stopped in front of a building out of which came a justice of the peace, and, in order to help this man out, allowed him to forfeit \$1.75 on a forfeit-collateral reckless-driving charge, so that he might proceed on his way.

We will show you that then this plaintiff was car-
27 ried back to the car, taken off the stretcher, and put in the Ford car, and his son drove the car toward Washington, after taking off the left rear wheel, which was broken completely, and impossible to ride upon, and repairing the right rear wheel, which had been blown out, and that when they got to a point called "Dead Man's Curve," between Baltimore and Washington, about half way between Laurel and Baltimore, the car broke down completely, could not navigate any more, and that there-

after this plaintiff stayed in that car, still suffering from what we will show you had been a partial paralysis of the right leg. That is the reason they had to carry him on the stretcher, and he stayed there until his sister had time to come from Washington in her car out to Dead Man's Curve, to carry him and tow his car into Laurel and leave the car there, and he was carried in to Freedmen's Hospital, where he was given first aid again.

We will show you that he was unable to obtain accommodations there, and he was carried to his sister's home, where he stayed, and, unable even to get into a bed, stayed on a sofa all night, and the next morning was carried back to Philadelphia in a new car which his son-in-law had just purchased, and drove him right back.

We will show you that from the time of this accident he was treated by Dr. Moleski, a physician in Philadelphia, and, for a three-year period, during 1936, 1937, and 1938, he was treated almost constantly by Dr. Moleski for
28 these ailments and injuries that he had.

We will show you that at the time of the accident he was a riveter, 54 years of age, and he worked regularly and was a hearty, strong, robust, virile man, unusually strong for a man of his age, working every day, and that since this accident he has not been able to work a day, as he could before, and he has not, in fact, been able to resume his work, and is not, in fact, able to work.

Now, if we show you these facts, and that this accident was caused by the negligence of this truck driver on this day in driving his car at a greater rate of speed than should have been prudent under the circumstances and conditions then existing at that intersection, and that the driver drove the truck on the wrong side of the road and he failed to keep a proper lookout to see this car coming from the other direction, and that his negligence in this respect caused this accident, we shall expect at your hands a substantial and fair verdict.

Opening Statement on Behalf of the Defendant

Mr. Quinn: If your Honor please, and gentlemen of the jury—

Mr. Offutt: Pardon me; there is a witness in the room.
(To the witness): Will you step out?

Mr. Quinn: Gentlemen of the jury, the evidence in this case, I think, will show an entirely different state of facts than what my friend has outlined to you.

29 The charge in the declaration in this case was that both of these cars, right before and at the time of the accident, were on what is known as Broadway Avenue at Bel Air, Maryland, one proceeding in a northerly direction and the other in a southerly direction. Counsel now claims that his client was going along Conowingo Road, and was attempting to make a turn into Conowingo Road while we were coming along Broadway Avenue and had just started to turn into Conowingo. The truth is that the car of the plaintiff was coming along Conowingo Road toward this intersection, where there is a curve. Broadway Avenue ends at that point, and merges into Conowingo Road, and he was going at a rapid rate of speed and attempted to take a right-hand curve on a wide road while going at this speed, and the evidence will show you that he skidded then over to the wrong side of Broadway Avenue, the side where the truck had a right to be, and the truck had not yet attempted to turn. The truck was about 15 or 20 feet back from the intersection where it would turn, and within 2 feet of the curb when it saw this man coming around this curve skidding, and the boy driving the truck immediately applied his brakes and turned his car even further in, so that his truck at the time of the collision had its front wheels of the tractor part up against the curb and the rear was less than 2 feet out from the curb on his own right side of the road.

30 The evidence will show you—and, by the way, in the charge in this declaration it is not claimed that at any time we were on the wrong side of the road; this is the first time we ever heard any such claim; the charge in the declaration is that we did not keep as far to the right of the center as we should in attempting to make a turn.

Furthermore, the evidence in this case will show you this, that before this plaintiff was taken to the justice of the peace, he was taken to a doctor who examined him to see if there were any bones broken, or anything of that sort, and then discharged him; that he was then taken by the police,

as was the driver of our truck, before a justice of the peace who is also a lawyer at Bel Air, Maryland, Judge Spencer, and that this man had an injury to his leg and he was not on a stretcher, but propped up on some equipment that the police have in the back of one of their cars, and the justice of the peace came out to the police car and there held a hearing, instead of requiring this man to go into his office, and that the officer, Officer Santee swore out a warrant charging him with reckless driving, and that he pleaded guilty before the justice of the peace. He did not forfeit collateral, but pleaded guilty and explained to the justice of the peace that if the road had not been wet, he could have made that curve in safety, but that the wet road caused him to skid and drive on the wrong side.

Because of his injuries, the justice of the peace only fined him one dollar and the costs of the case, and he
31 was permitted to go, as was our driver, and then he proceeded here to Washington.

Now, gentlemen of the jury, those are the facts of the case. The records of the justice of the peace and of the police will be here, and the justice of the peace and the police officer will be here to tell you about it.

Mr. Offutt: Since Mr. Quinn said that the declaration does not charge that he went on the wrong side of the road, may I ask your Honor to look at the pretrial order, and allow me to amend the declaration if it does not so state? It says that both cars claim that the other was on the wrong side of the road.

Mr. Quinn: That is the claim that he made before the pretrial judge, but he did not take advantage of the opportunity to amend his declaration.

Mr. Offutt: And Mr. Quinn did not raise any question there, for we could have changed it there.

The Court: Well, I will have to grant the motion to amend the declaration, but if Mr. Quinn should show that he was taken by surprise and cannot go on with his case, I will have to grant a continuance.

Mr. Quinn: I am surprised that they should make any such claim, but I am prepared to go on with the case.

Mr. Offutt: I do not see how they can be taken by surprise. On September 27 Mr. Quinn signed the pre-

32 trial order, and I signed it also. At the bottom of the first page—

Mr. Quinn: What you signed is what you stipulated, but to stand up there and make any claim you want—

The Court (smiling): You both can testify to a moderate degree, gentlemen.

Mr. Offutt: May the declaration be amended?

The Court: Yes, sir.

Mr. Offutt: Shall we do so right at this time, or proceed?

The Court: You can do it at the noon recess.

Mr. Offutt: Will you call Mr. Liberatto?

Mr. Quinn: Is this man going to be a witness to the accident? It has been a practice, enforced by the courts, that the plaintiff should take the stand first.

The Court: That is not the rule in any jurisdiction I am familiar with; but if counsel agree that that is the rule, I will, naturally, follow it.

Mr. Quinn: Our judges have universally enforced that rule, due to the fact that the order precluding witnesses would be nullified, in so far as the plaintiff was concerned, if he were permitted to sit here and listen to what they said.

The Court (to Mr. Offutt): What is your view?

Mr. Offutt: That is generally the custom, but this is not a witness to the accident; merely a person who took some photographs, and I thought, rather than keep him around all day—

33 Mr. Quinn: I have not any objection.

Thereupon **Venancis Liberatto** a witness of lawful age, was called as a witness on behalf of the plaintiff; and, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

Q. Your name is Venancis Liberatto? A. Yes, sir.

Q. Where do you live, Mr. Liberatto? A. I live in 409 Takoma Avenue, Takoma Park, Maryland.

Q. Mr. Liberatto, do you know the plaintiff, Mr. Traynor, who sits here? A. I don't think I know him, but I observed him once when I went to get a picture of his car.

Q. Will you tell the Court and jury when it was that you went to get a picture of his car and saw Mr. Traynor? A. I think way back in October, 1936.

Q. Was it October or November? A. I am not sure exactly. I think it is November. I do not know.

Q. Did you take a picture there? A. Yes, sir. I took it back at his garage there.

Q. What did you make a picture of? A. With a
34 620 Kodak.

Q. What was the object of your picture? A. Well, the object was to get the damaged part of the car.

Q. An automobile is what you took a picture of? A. Yes.

Q. Did you take a picture of it? A. Yes.

Q. Now, look at those three photographs, and I ask you if you can identify them. A. I took the three of them, yes.

Q. State whether or not they are the photographs which you made on that occasion. A. These are the three photographs I made on that same day when I went to see Mr. Traynor.

Q. After you made the photographs and they were printed, to whom did you give them? A. To Dr. Fonbuena.

Q. Who is sitting right here? A. Yes, sir.

Q. Do those pictures fairly and accurately indicate and show the car which you photographed at the time? A. Yes, sir.

Mr. Offutt: That is all.

35 Cross Examination

Mr. Quinn (to the reporter): Will you mark those, please?

(Photographs of plaintiff's car marked, respectively, Plaintiff's Exhibits 1-A, 1-B, and 1-C for identification.)

By Mr. Quinn:

Q. Showing you Plaintiff's Exhibit 1, and calling your attention to a couple of circles right on the photograph, did you note those at the time you took the photograph? Do

you see what I mean here (indicating), and here (indicating)? A. I think they were damaged that way.

Q. And they were on that car when you took the photograph? A. They were bent at that time.

The Court: May I see them?

Mr. Offutt: Yes, your Honor.

Mr. Quinn: No objection to them.

Mr. Fonbuena: May the witness be excused?

The Court: Is there any objection?

Mr. Quinn: None, your Honor.

Mr. Offutt: I do not like to sit with my back to counsel all the time. Usually we sit at the same table. Does your Honor prefer to have us sit any other way?

Mr. Quinn: I have no objection to your back.
36 You have a nice back.

Mr. Offutt: Will you take the stand, Mr. Traynor?

Thereupon **William F. Traynor, Sr.**, the plaintiff, took the stand in his own behalf; and, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

Q. Will you state your full name, Mr. Traynor? A. William F. Traynor; William Francis Traynor.

Q. Where do you live, Mr. Traynor? A. My permanent address was 3315 Palethorpe Street, Philadelphia, Pennsylvania, at the time of the accident.

Q. Where do you live— A. 120 Adams Street, Northwest, with my sisters.

Q. You live here in Washington now? A. Yes, sir.

Q. How long have you been living at 120 Adams Street? A. Since May, 1938.

Q. Directing your attention to October 17, 1936, will you tell the Court and jury—first, were you involved in an accident in Bel Air, Maryland? A. Yes, sir.

Q. Were you riding in an automobile at the time? A. Yes, sir, I was riding in an automobile.

37 Q. Who owned that car in which you were riding at the time? A. My son.

Q. Who was operating it? A. I was.

Q. Where were you going and where had you left prior to the accident? A. Where was I going?

Q. Yes. A. I was on my way to Washington, to see my sister.

Q. What is her name? A. It is Margaret Munson, and Mrs. Allen.

Q. Where is your sister employed? A. One sister is employed at the Department of the interior, Freedmen's Hospital, and the other is at St. Elizabeth's Hospital.

Q. Where did you live when you started on this trip? A. I lived at 3305 Palethorpe Street, Philadelphia.

Q. What time did you leave? A. I left about 4:30 in the morning.

Q. What speed did you maintain while you were driving up to the time prior to when the accident occurred? A. Not at any time over 35, because I had plenty of time. Between 30 and 35 per hour.

Q. What was the speed you were driving your car at just before the accident occurred? A. I remember coming into that intersection, where I saw that speed sign of 25 miles an hour. I was under 20 miles an hour when the accident happened, because I always pay particular attention to my speedometer; below 20 miles an hour.

Q. How far was the sign you referred to from where this collision took place? A. From the first sign, the "Dangerous Intersection" sign, it was about 44 feet to the first sign, and from that sign to the center of the curve was 79 feet, right at the center of that curve, at the intersection.

By the Court:

Q. Do you know whether there were corresponding signs, danger signs, on Broadway? A. Yes, sir.

By Mr. Offutt:

Q. Do you know where those signs were? A. Yes, sir. There was one 56 feet, and the other was 44.

Q. What sign was 56 feet from the intersection? A. The one nearer to Baltimore.

Q. What kind of a sign was that? A. "Dangerous Intersection" sign.

Q. Can you describe the sign? A. I describe it as a square sign on that tree; it was written on that sign,
39 "Dangerous Intersection."

Q. Were the words "Dangerous Intersection" actually written on the sign? A. Yes, sir.

Q. What was the other one like? A. That is just part of a marker, more like a route sign at an intersection, with an initial or something on there. I did not get that very plain.

Q. Since the accident occurred, did you go out to the scene of the accident? A. Yes, sir.

Q. How did you determine these measurements? You mentioned some measurements there. I think you said—what did you say the distance of the sign was, the first sign you saw from the intersection, which said 25 miles an hour? A. 44 feet. It was stepped off at 44 yards—that is what I mean.

Q. How did you determine it was 44 yards? Was that at the time of the accident, or have you been back since? A. Since the accident I went back and stepped it off.

Q. Did you do anything else since the day of the accident when you went back there and measured it off? A. Since the accident?

Q. Was anything done at that time? A. Since
40 that time I have noticed a change in the intersection, where the hedge fence that was there, that was an obstruction to see anything on my side, has gone away from there.

Q. Will you explain more about the hedge? You say the hedge on your side. Tell the Court and jury where that hedge was on the day the accident happened. A. When that accident happened, as I came by, noticed on my right side of the road, which was on that side (indicating), that there was a high hedge fence there, and that made that pretty hard to look over.

By the Court:

Q. Was the hedge on both the Conowingo road and the Broadway road, or simply on the Conowingo road? Did the hedge continue around on the Broadway road? A. That would be the Broadway road, on that side (indicating).

Yes, it was on that side, on my right side coming from Philadelphia.

By Mr. Offutt:

Q. You have been indicating with your left hand, like that (indicating). A. It was on that side; I mean, making that turn from my right, coming from Philadelphia, and that indicates I am coming that way, while the other man coming from Baltimore would have to make a left—

Q. If you were sitting in the car, just like you are
41 sitting here, which side would the hedge be of you?

By the Court:

Q. This would be the Conowingo road here (indicating)?
A. Yes.

Q. And this would be the Broadway road? A. Yes.

Q. And your testimony is that there was a hedge here (indicating), which went around here (indicating)? Is that correct? A. Yes, sir.

By Mr. Offutt:

Q. Will you state whether or not any photographs were made when you went to the scene of the accident after it occurred to step off the distances as you just stated? A. To take the photographs of the curve, yes; they were made after the accident.

Q. How long ago were they made, to your knowledge?
A. Oh, about two weeks ago.

Q. Were you present when they were made? A. Yes, sir.

Q. Will you examine those photographs which I just handed you? Examine your car first.

The Court: I want to ask him, had the hedge been removed at the time those photographs were taken?

The Witness: Yes, sir.

42 The Court: The general rule is that unless the physical conditions are identical to the condition at the time of the accident in all essential particulars, the evidence over objection is not admissible, because it might create, even with an explanation, a false impression.

Mr. Quinn (to Mr. Offutt): If you show me the photographs, I may not have any objection.

Mr. Offutt: Do you want to see them before he identifies them?

Mr. Quinn: Yes.

By Mr. Offutt:

Q. Was there any change in the roadway itself when you went there about two weeks ago? A. No change in the road, outside of that hedge was removed. I did not see the hedge there.

Q. Was there any curbing on the road that was not there before? Any change in the road construction itself? A. No, sir.

Q. Was the turn the same as it was on the day of the accident? A. Yes, sir.

Q. Were there any other lights there? A. There is a blinker light there.

Q. Was there a light there on the day of this accident?

A. There was a blinker light there, yes.

43 Q. Were those signs that you just stated—were they there on the day of the accident? A. Yes, sir.

Q. Were they in the same location as they are now? A. Yes, sir.

Mr. Quinn: If you will hold those photographs until I have someone look at them, I might agree to them.

The Court: They won't be offered immediately.

Mr. Offutt: Very well.

Q. As you came to the intersection, what was your speed?

A. About 18 to 20 miles an hour.

Q. How do you know that? A. Because I had just looked at my speedometer coming into it.

Q. When with reference to the time you looked at the sign did you look at your speedometer, the sign which said 25 miles an hour? A. That is when I started looking at my speedometer, the minute I hit that intersection sign.

Q. Had you driven that way before? A. Yes, sir, many times.

Q. Did you know that that curve was there? A. Yes, sir.

Q. What was the condition of the roadway at the time?

44 A. Well, it was fair. It had been a little damp in the morning when we started out, but it seemed to be very fair at the time of the accident. It did not seem to be wet or raining at that time.

Q. What time of day was it? A. About ten minutes of 7 in the morning.

Q. Describe in your own words just what you did in driving your car, and what transpired.

The Court: What was that date in October?

Mr. Offutt: October 17, 1936.

Is that correct?

The Witness: That is right.

The Court: About ten minutes of 7?

The Witness: About ten minutes of 7 in the morning, yes.

As I came into this intersection sign, where it says "Dangerous Intersection," I am sitting in the car, driving the car, and I noticed the sign, and I had been driving up to that sign where it read "25 miles an hour" and my boy says, "25 miles an hour." I said, "O. K."

I watched my speedometer and cut down the speed and made that approach into that intersection, and I come right to the curve. My car is under control, and I am holding my right side of the road. Just as I come to that curve, this truck came up on me so fast—I cannot reckon his speed—that I spied that truck kind of cutting to me, crowding me, and I remember giving my wheel a pull and making an effort to get away from him and that is as much as I can detail until I was taken out of the machine.

By Mr. Offutt:

Q. When you say you saw the truck come toward you, pull toward you, what is your best judgment of the distance the truck was away from you when you first saw it? A. To the best of my knowledge, he was not more than 10 feet away from me and right on top of me. I saw him heading for me, and he had already made his approach over the line—

Q. There was a line in the road? A. There was a line in the road.

Q. Where was the line? A. In the center of the road.

Q. Where were you with reference to that line when you saw his car in front of you, pulling toward you, on which side of the line? A. I was on my right side of the

line, on this side (indicating), making my right-hand turn.

Q. Was there a curbing on the right-hand side of the road at that point? A. Yes, sir.

Mr. Quinn: On which side? His right?

By Mr. Offutt:

Q. On your right, or the other man's? A. My right.

46 Q. Was there one on his right, too? A. There was one on the left of me, coming in.

Q. Would that be on the right-hand side of his car? A. That would be on his right, yes, sir.

Q. About how high was that curbing you speak of on your right? How high off the roadway? A. About 10 or 12 inches at that particular point.

Q. How far were you from that curbing when you saw his car coming toward you, and you say that you pulled to the right? A. About how far was I?

Q. Yes. A. About 2½ feet.

Q. About how wide is that road?

Do we have a blackboard? I think that we could demonstrate to the jury a little bit. A. At that particular point, I stepped it off at 9 yards.

Q. 9 yards wide? A. Yes, sir.

Q. What point is that? A. Right at the center of the intersection, at the curve, right on the curve.

Q. When you say 9 yards, do you have in mind one step— A. Stepped it off; nine steps right across.

47 By the Court:

Q. Is that across the Conowingo road or the Broadway road? A. It is right across the Conowingo road, right straight across.

By Mr. Offutt:

Q. Where did this collision take place with reference to the Conowingo road and Broadway Avenue? A. That is the Conowingo road as we were coming in that way, and that happened right in that intersection.

Q. Having in mind the number of the route where you had been and when you saw the sign "25 Miles an Hour," will you state whether or not that was Conowingo road or Broadway Avenue? A. That is the Conowingo road.

Q. And you were turning into Broadway Avenue? A. Yes. That happened right off the Conowingo road and Broadway road, right there at the intersection.

Q. Where did the accident happen, having in mind Conowingo road and Broadway Avenue? Were you on the turn or were you on Conowingo Road before you made the turn? A. I was right in the turn.

Q. What is the next thing you remember? A. The next thing I remembered after that was being carried in a doctor's on a stretcher. I came to after my boy had came to the car they put me in; I was on a stretcher getting
48 into a doctor's office.

Q. After the crash took place, did you see that truck again? A. I cannot recall seeing that truck.

The Court: The deputy marshal was talking to me just at that time, and I did not hear that.

By Mr. Offutt:

Q. How did you get to the doctor's? Can you state that, if you know? A. How did I go?

Q. Yes. A. There was an ambulance that took me there. I was on a stretcher. That is all I can recall, being taken to the doctor's on that stretcher.

Q. Will you state your condition? How did you feel? A. I felt terrible, if I say it myself. I was nearly crazy with pain. I was all befogged. I could not explain how I would feel; I was in such misery and suffering at the time.

Q. Any particular portion of your body? A. My head and my back hurt me so bad, I could not move. I could not lift my arm. I was nearly crazy with the pain.

Q. Which leg? A. My right leg, and my right side, and my back. I still have it all the time. I guess I will always have it. My back is so bad. I could not raise my hands; I know that.

49 Q. You say you were carried to the doctor? A. Yes, sir.

Q. Do you know the doctor's name? A. Dr. Davis.

Q. Have you endeavored to locate Dr. Davis since the day of this accident? A. I have tried but failed to find him. He don't live there any more.

Q. Could you find anyone who knew where he lived? A. No, sir.

Q. When was it you endeavored to find him? Right shortly after the accident? A. I guess a couple of months later, or maybe a month later they tried to locate the doctor through my own—

Q. (interposing) You did not personally go after him a month afterwards? A. No.

Q. Only mention what you actually did yourself. A. Yes.

Q. How long was it after the accident you attempted to find Dr. Davis yourself? A. It was about, to the best of my knowledge, about a month later, through my own doctor, was trying to find Dr. Davis for information concerning my examination. That was what called my first attention to Dr. Davis, see?

50 Mr. Quinn: We will give them the address of the doctor, if they want it, their own doctor.

Mr. Offutt: Not our doctor; you know that.

The Court: How is that?

Mr. Offutt: Mr. Quinn offered to give me the address just now of the doctor, and he said it is our doctor. I submit that it is an unfair statement, and ask the jury to disregard it.

The Court: As I understand it, plaintiff tried to find the doctor and could not, and Mr. Quinn says he knows where the doctor is. I don't see any objection to that. Just because Mr. Quinn knows where the doctor is does not mean that the plaintiff knows.

Mr. Offutt: Very well, your Honor.

The Court: Proceed.

By Mr. Offutt:

Q. Mr. Traynor, will you tell the Court and jury what transpired at the doctor's office, that you recall? A. Well, after I was carried—I was still laying on my back and could not get up, only move my head a little bit. The first thing I recall is a little girl standing there. It just seemed like a dream to me.

Q. Were you suffering then? A. Oh, I was suffering terrible; I could hardly stand it. I had not gotten no treatment as yet that I remember, and I don't know how long I laid there when I was stood up. The doctor
51 and somebody stood me up. I can't tell what the doctor looks like, but I know that was a doctor, be-

cause I could feel somebody feeling me, and I could hardly see them.

Then I was laid back on the stretcher, laid down again. The next thing I recall was my boy standing alongside of me. I had not seen him until then, and I recall seeing him plain.

Q. Don't state any conversation. A. I seen my boy standing there. Then I remembered that my boy had been there, and my clothes was put on again, and I was taken back in this automobile.

Q. Were you given any treatment that you know of while you were there? A. I don't remember any treatment at all.

Q. About how long would you say you were there? A. Oh, I could not just tell you. It seemed to me like months, the way I felt.

Q. What next transpired, that you recall? A. What?

Q. You were carried out on the stretcher and into a car? A. And put back in this ambulance again.

Q. Then what happened? A. Then my boy was alongside of me; I remember seeing him, as I was taken back to the car, back to my car, and all I know was that they stopped in front of a building somewhere and I could hear somebody talking, and I was still laying on this
52 stretcher.

Q. Was that before you got to your car that they stopped in front of this building, or after? A. Before. That was on the way back from the doctor's. What was said and what went on I cannot say. I don't know. I don't know.

Q. Did there come a time after that occurred when you arrived at your car? A. Yes.

Q. Do you remember that? A. I don't remember getting to the car. That is the funny thing about it. But I do remember shortly afterwards being in the car. I don't know how I got in the car, and I did not know until I asked my own son how I got to the car.

Q. Don't state any conversation between you and your son. A. Well, that was it.

Q. Where was your car, then, when you found yourself in it? A. That I don't know. I know I was in a car, but I didn't know where the car was. It was in Bel Air, but I didn't know, because I was like that.

Q. Do you know when the car started up on your trip again? A. What?

53 Q. Did there come a time when the car which you had been driving was again driven toward Washington? A. Yes, sir. The car was driven to Washington.

Q. Do you recall that? A. I recall getting drove in.

Q. Do you know what the damage was to the car which you had been driving at that time? A. Right at that particular moment?

Q. Yes. A. I could not tell you what was done to the car at that particular moment, but afterwards I saw the damage of the car.

Q. How far did you drive toward Washington after you recalled being driven toward Washington again? A. The car was driven from Bel Air to Dead Man's Curve, this side of Baltimore.

Q. With reference to Laurel and Baltimore, can you give us some idea where Dead Man's Curve is? A. I don't know. I know that it is quite this side of Baltimore, over the Washington-Baltimore Boulevard.

Q. What happened then? A. Well, the car just naturally stopped when it got around the curve, and would not go no further.

54 Q. How did you get into Washington from that point, if you know? A. I was still in the car, and my boy had gotten out of the car and was phoning and phoning and phoning and sent word to Washington to have my sisters come and get me, and it was about 5 o'clock that evening when my sisters got to me, and I was still wedged in that little car when they got there—I don't remember their coming at the particular time, because I was all "smoky"; they claimed that I did not even know them.

Q. Don't state what they claimed. A. I didn't know them. I didn't know anything about this, and they backed the car up—

Q. Do you know anything about their backing the car at all? A. I just about remember their backing the car up and getting me in it.

Q. During all that time, from the time you left Bel Air until they came to your car, state whether or not you were suffering, and describe how you suffered. A. From the

time they picked me up, I had my senses more then; they seemed more clear to me, and all I can recall is the suffering and agony and pain, with the thought that I would pass out.—

Q. Was your leg still hurting you? A. Every portion of it hurt me so bad I could not stand the pain. It was so painful I didn't know what would happen. To tell you the truth, I thought I was going to die. I tried to
55 make a fight to pull through with it.

Q. They did come and get you in their car? A. Yes, sir.

Q. What happened to the car that you had been driving at that time, if you know? A. They had towed the car back, and when they got me in the car they towed the car to Laurel and they had to leave it.

Q. Where? A. At a garage, the first garage on the other side of Laurel, just as you are going out of Laurel toward Baltimore, that little garage on the left.

Q. It would be on your right as you went into Washington? A. On your right as you went into Washington, just on the other side of a little concrete bridge.

Q. After they left that car, where did they drive you then? A. I was driven from there right straight to Freedmen's Hospital.

Q. State whether or not you received any treatment there. A. They took me out of the car and put me in a wheel chair, and the attendants took me out and gave me first aid treatment. They laid me on a table and strapped me and bandaged me up, and they brought me back and put me in
56 the car and took me to 123 R Street.

Q. How did they strap you? A. All around my leg and around my body and up over my shoulder, across my chest that way (indicating) and over my leg and strapped it so tight I could hardly stand it.

Q. Did you have any lacerations or cuts? A. Yes, my hands. I still carry the scars here yet, from flying glass.

Q. State whether or not they did anything to your head. A. I was cut right on the side of my head. My glasses was broken in that accident. I don't know whether it was my glasses that cut me, or what it was.

Q. You say you had a cut on the left side of your forehead? A. Right here (indicating).

Mr. Offutt: Indicating over the left eye.

Q. State whether or not you stayed at the hospital. A. Whether I stayed there? No, I could not stay there, because they said they could not give me no bed; they had no beds open. I was to come back on Monday morning or Saturday morning.

Q. Where did you go? A. To my sisters', 123 R Street.

Q. What is her name? A. Mrs. Allen and Mrs. Munson.

57 Q. State what you did when you got there, how you were carried in the house. A. When I got there, they carried me in my chair to the living room and propped me up in that chair with pillows and cushions, and there I remained in that chair, because I was too sore to be touched or laid down. When I laid down, I choked, could not get my breath, and I stayed in that chair all that night until Sunday about 1 or 1:30. My son-in-law and my wife and daughter came down from Philadelphia, with a new car, and they carried me out in this chair and worked me into this car and blocked me up and took me back to Philadelphia.

Q. When you got back to Philadelphia, where did you stay then? The same house where you left? A. Yes, sir. I was living there.

Q. Were you confined to your home at that time? A. Yes, sir.

Q. State whether or not you were confined to your bed. A. Well, they took me over. It was about two days and two nights that I could not be moved; I was so bad and so critical that I screamed if they would touch me, so they let me rest in the reclining chair, propped up, for two days and two nights, and my son-in-law and the storekeeper that I was dealing with and my brother who had come from Washington to Philadelphia to take my place where I was working, carried me up to bed.

58 Q. Where were you working? A. Allen Iron & Steel Company.

Q. What were you doing? A. At the time, driving rivets in coal chutes.

Q. Were you regularly employed there, or part time? A. Regularly.

Q. How much were you earning? A. I was making an average of \$26.40 a week.

Q. How long had you been making that average earning?
A. At that particular plant?

Q. Yes. A. At that particular plant, to the best of my knowledge, it was about two months that I had gotten a job.

Q. Had you been doing similar work at other plants before? A. I have. I have always been a structural iron worker, all my life.

Q. Were you regularly employed before that, about two months, as a structural iron worker? A. The way the structural work comes up, you cannot say you are regularly employed at any time. Jobs vary from two to three weeks or maybe a month and you are laid off until another job.

Q. Having in mind that you were not regularly employed, but only employed as you have just stated, what would you say your average earnings were prior to the two
59 months prior to the time when you say your average earnings were \$26.40 a week with the Allen Iron & Steel Company? How much were they on the other work?
A. To the best of my knowledge and figured out as I have done for the past thirty years, it would range from around eighty to ninety to ninety-five dollars a month, something like that.

Q. You state that these persons came to your house, the storekeeper and your brother and son-in-law. What happened then with reference to just what did they do? A. They got me out of the car, and I was so bad they worked me into a chair. They carried me back into the parlor, and there I was left, to stay there in the parlor, and they covered me over, because I screamed "murder."

Q. You stayed there two days? A. Two days and two nights.

Q. What happened then? A. After that, by the orders from the doctor, was to get me right up into bed, and they carried me upstairs and worked me off the chair and put me in bed.

Q. How long did you stay in bed? A. Around two months in bed before I could even get out.

Q. Were you under the care and attention of a doctor during that period of time? A. All the time, yes, sir.

60 Q. When did you first get the doctor after you returned to Philadelphia on October 18, the day fol-

lowing the accident? A. I was hurt the 18th. It was around the 20th, the next time I had the doctor on the job.

Q. Did the doctor come the first day you got back from Washington to Philadelphia? A. Yes, sir, I think he did the very first day.

Q. You say you were in bed about two months? A. Yes, sir.

Q. What happened then? Were you out of bed completely from that time on? A. No, sir.

Q. Describe what your condition was. A. During that time I was in bed, I was not able to move. I had to be waited on like a child. They had to turn me over. I had my wife as my nurse, with the assistance of my brother sometimes.

Q. She did what? A. Helped me turn from side to side, because my back was so bad I could not lay on it.

Q. How was your right leg then? A. Oh, it was terrible. That was the worst feature I had. It is the thing that held me back so long.

Q. You say they helped you. Could you help yourself? Did you try? A. I had tried and I had no results. I could not seem to get action in it.

Q. Prior to this accident, what was the condition of your health, and what was your strength? Were you able to do things? A. I guess I don't like to brag about myself, but I never laid down on anything, and I have been a hard worker all my life, rugged, climbing, driving rivets, and so forth. I had no sickness at all or no injuries, did not know what it was to be sick.

Q. Did you say Dr. Moleski was your doctor? A. Yes.

Q. What was his address? A. 2626 East Allegheny Avenue, Philadelphia.

Q. How often did he treat you? A. For the longest while—I can't recall how many visits—he used to come in the morning and come back in the afternoon, twice a day at first. Then he cut it down to about every other day, and when I was able to get around, and was on my feet, with a cane, he used to come over maybe twice a week and they still kept treating me until I got on the street, until I started to walk. I would go, when I felt to be myself, to his place for a treatment, maybe once a week.

Q. How long after the accident was it before you were able to get up and around with a cane? You said
62 you were two months in bed. A. I say it was about two months that I was bed fast, see? Then I will say it was two weeks that I moved around in the house before I could get out, until my wife went out with me and she would assist me in the street, take a little walk with me. She was always with me until I could go by myself.

Q. How long was it before you were able to go by yourself? A. From the time I got out of the house?

Q. Yes. A. I figure before I was able to discard my cane, it was about four or five weeks that I could balance myself and go ahead and walk.

Q. Would you say that was four months after you were hurt, that you were able to get around by yourself? A. Yes, it was around four or five months, so that I could get out, and start and walk off right.

Q. Will you state whether or not you were given any medicines of any kind by the doctor when he treated you? A. Yes, he was giving me medicines right along.

Q. Were they given to you in the form of prescriptions required to be filled? A. Yes, sir, all my medicine was all prescription medicine.

Q. How long a period of time were you under Dr.
63 Moleski's treatment? A. How long?

Q. Yes. A. I say I was under his treatment for at least five, close to six months from the time of the accident up to the time I came back to Washington.

Q. Did he treat you during the year 1936? A. Yes, sir.

Q. How about 1937? A. In 1936 and 1937.

Q. How were you treated in 1937? Did he attend you at your home, or did you go to his office? A. I used to go to the office mostly whenever I felt the worst. I would go myself and my boy would take me in the car to his office.

Q. What kind of attacks are you referring to? Will you tell what you mean by attacks? Tell the jury what pain you had. A. When my pains hit me, as they do yet, I get terrible headaches. I would get a pain in my back and right side, and my leg would hurt me, so I would feel very nervous trying to stand the strain of the pain. I would get myself all worked up. When we went to see the doctor, he would give me something for my nerves, a medicine to

take, a liniment to rub myself down, and advise me to take hot baths and rub the liniment on and rest myself.

64 That is the way he treated me towards the last.

Q. When you got back to Philadelphia, after you had been driven back by your son-in-law and daughter, what did you find were your ailments? Describe to the jury and the Court what your ailments were. A. What did I find?

Q. What did you find? A. Well, I think I just told you about my leg. My right leg hurt me so bad at the hip, and my right side and my back was so bad, and my head hurt me. That is all I can recall.

Q. Did you cough up anything? A. I had a cough from the time of the accident. Of course, I did not explain that.

Q. Did you have a cough before the accident? A. Not before the accident, no, but while I was going from Bel Air to Washington, and, well, for maybe several days later, when I would spit blood. I thought I was hurt inwardly.

Q. You say that that lasted for four or five days? A. Yes, for four or five days afterwards.

Q. How long did your cough last? You spoke of a cough after the accident. A. My cough? I still have some left yet. I still cough yet.

Q. Did you have a cough immediately preceding the accident? A. Right after the accident.

65 Q. Right before the accident? A. No cough before the accident. I didn't have no cold before the accident. It seemed to leave me with that cough.

Q. Did you have any pain in your chest? A. Yes, right here (indicating), terrible pain, right on my chest here.

Q. Do you know whether or not there was any blood in your urine at that time? A. I did not say as of the time I had passed the first urine. From the time I had left Freedmen's Hospital, from a Saturday night, I did not remember making any urine until it was Sunday, 1 o'clock, and then I had it in one of these bottles in the car. They give me one to go back to Philadelphia with, and my son-in-law stopped for me to pass this urine on the road going home.

Q. Did there come a time when you did or did not see any blood in your urine? A. I never saw any blood in my urine.

Q. State whether or not you ever had any pain around your testicles. A. Pain right down here in the groin, from the way that leg hurt me. I still have that yet.

Q. How frequently would you say that a doctor attended you in 1937? A. Well, he used to come—we would say for the first week or so he came about every other day.

Q. You are talking about 1936 or 1937? A. 1937. 1936, he attended me regularly.

Q. How often would you say—did he treat you during the whole year of 1937? A. No, he did not treat me during the whole year, but I went to his office for treatment. It was during 1937 that I went backward and forward to the office.

Q. How about 1938, now? A. It was 1938 that I came to Washington.

Q. Did you see Dr. Moleski until in 1938? A. I saw him just before I came down in 1938.

Q. When did you come to Washington? A. It was the 1st of May, 1938.

Q. Having in mind January, February, and March of 1938, can you state whether or not Dr. Moleski saw you at his office or at your home during those months at all? A. It was just about before I came down that I had seen Dr. Moleski at his own office.

Q. Was there any other doctor who treated you or attended you while you were in Philadelphia? A. No, there was no other doctor; I had no bills from another doctor.

I had a doctor, but I didn't get no bills, because he
67 was an osteo—

Q. Did the other doctor give you any treatment for your injuries? A. Yes.

Q. What is his name? A. Dr. Lightfoot.

Q. Do you know where his office is? A. I don't know. My family's people know that.

Q. Do you know what street he is on? A. I know he is on Allegheny Avenue somewhere.

Q. Having in mind Dr. Moleski's address, 2626 East Allegheny Avenue, can you state whether or not it is in that vicinity? A. He is not that far over. He lives on East Allegheny, and this other doctor is this side of Kensington Avenue—I would say 2626 East Allegheny Avenue and he only lived a short distance from me—they tell me on Allegheny Avenue.

Q. Do you know his first name? A. I don't know. I only know him as Dr. Lightfoot. He was an osteopathic doctor.

Q. Can you tell us how many times he treated you? A. He used to come once a week. I had him for about, I would say, five or six weeks.

Q. How much did you pay him for each visit? A. Two dollars a visit.

68 Q. So that would be about six visits that he made?

A. Yes; that is, to the best of my knowledge.

Q. Did you ever have any other doctors attend you for your ailments that you received in this accident? A. No, sir.

Q. Did a Dr. Warfield, W. A. Warfield, in Washington, ever examine you or attend you in any way? A. I was up to see Dr. Warfield for examination.

Q. He never treated you? A. He never treated me. I received no treatment from him.

Q. Do you recall when he examined you? A. No, I cannot just recall that.

Q. Was it in April, 1938? A. It was in 1938, but I just cannot remember the date.

Q. Having in mind when you first came to Washington to stay, was it around that time? A. It was close to when I came to Washington, yes.

Q. Did Dr. Moleski render you a bill for the services that he rendered? A. Yes, I remember him sending me a bill. I would have to remember that.

Q. Do you remember that amount of the bill? A. The bill was \$457 or \$447, I think.

Q. I show you this and ask you if you can identify
69 it. A. Yes, that is the bill.

Q. What is that? Is that the bill you got from Dr. Moleski? A. Yes, this is the bill.

Q. State whether or not all of those papers were together when you received them. A. This whole bunch of forms was all written, and he handed me this, just like this.

Q. What did you do with them after you received them? A. I sent them to Washington.

Q. To whom? A. To Mr. Fonbuena.

Q. Right here (indicating)? A. Yes, sir.

Mr. Offutt: (To the reporter) Will you mark those for identification?

(Batch of papers referred to as Dr. Moleski's bill marked Plaintiff's Exhibit No. 2 for identification.)

Mr. Offutt (to Mr. Quinn): May I know about these pictures? You said you were going to let us know.

I would like to ask him a couple of questions about those pictures.

The Court: He can be recalled.

By Mr. Offutt:

70 Q. Now, Mr. Traynor, you spoke about the work which you did before this accident occurred being structural steel iron work, and being hard work. Describe what type of work that was. A. All my life I have been what they call a structural iron worker. Them is the fellows that goes out and puts up steel bridges and buildings and tears down old buildings and put up new ones. I worked my way from way back in 1905 up to the present time, from a man in the gang up to a foreman. I was a full-fledged journeyman.

Q. Did you have a card as such? A. Yes, sir, I carried a card for thirteen years in Local 13 in Philadelphia, and I carried a card in No. 5 here in Washington.

Q. Local Structural Steel and Ornamental Ironworkers? A. Local Structural Steel and Ornamental Ironworkers.

Q. Is that the type of work where you go on these steel girders up in the air? A. Yes, sir, put those buildings up, and put the bolts in, and put the iron together, and put the scaffolding up, and driving the rivets.

Q. How are the rivets driven? A. With an automatic air hammer, and you have four men in a gang, and one man has to drive those rivets. One man is on one side and the other man is on the other side with a big machine in his hand.

71 Q. Which is the work you did? A. Any portion of it. It varies. Sometimes you are a riveter, and at other times a buckler-up or a re-sticker-in, as they call it.

Q. How long prior to this accident had you done work of that kind, or the last time you did this type of work? A. In 1935 I worked on and off for this man I was employed for for 25 years, until—

Q. What is his name? A. Harry F. Hare.

Q. Where is he located? A. 2646 North Thirty-Third Street, Philadelphia, Pennsylvania.

Q. You say you worked about 25 years— A. 25 years.

Q. Was that the latter part of 1935 or the middle part or early part that you last worked for him? A. It was about the early part of 1935.

Q. Since this accident occurred, have you endeavored to do that kind of work again? A. Since then I have not went back to that work, but I went back for a short period to drive rivets again on new cars, what they call those streamlined cars.

Q. Was that operating the same kind of riveting— A. (interposing) Riveting machine, exactly; the same
72 identical kind of rivets.

Q. State whether or not you were able to perform that kind of work when you went back to try it. A. Well, I hired up for the E. B. Budd Manufacturing Company in Philadelphia. A friend of mine came and told me to get the job, and I went back there to go to work and I started to drive those rivets, and I found when I started that I could not keep up there where I belonged, because it seemed there was something lacking. I would tire out too much, and I was losing more rivets than driving; the inspectors was cutting them out because I would not put the force behind them.

Q. What did you observe? A. My back and everything gave out on me. My condition broke down and I could not keep up with it.

Q. State whether or not your back hurt you. A. It did hurt me all the time. That was my trouble.

Q. Do you know where Mr. Hare is now? A. He is dead.

Q. Harry F. Hare—he is dead now? A. Yes, he died.

Q. When did he die, if you know? A. He died around 1936, I think it was, because I worked for him in 1935.

Q. Do you know Mr. J. Raymond Kenney? A. No, I don't recall the name.

73 Q. Do you know Anna M. Hare? A. Yes, that was my employer's wife's name.

Q. Was she familiar with the business, if you know? A. Oh, yes; her and I were together when my employer was sick for many years. At times he would get sick. We would both run his business at the same time. I acted as a partner for him. That was about the time I was foreman with him. I was very familiar with his wife.

Q. How old a woman was she? A. A woman about my age, 50 or 54.

Q. Identify that writing, and tell us what that is (handing a paper to the witness). Don't read what is in there.

A. Yes; I identify this writing as Mrs. Hare's, as a recommendation.

Q. Don't state what is in there.

I want to offer this.

(Paper containing Mrs. Hare's handwriting offered in evidence, unmarked.)

By Mr. Offutt:

Q. You said that you had some prescriptions filled at various times when Dr. Moleski prescribed them for you as medicine that you should take. Can you give us some idea of how much you spent on having prescriptions filled and other medicines which you obtained? A. No, I could not.

I have not kept a record of it. I know it was quite a
74 little sum, different things I had to buy.

Q. Can you give us some idea, your best recollection on it? Think it over carefully and see if you can estimate what you spent in that period of time. A. In that period of time for medicine?

Q. Yes. A. That would be hard.

Q. Do you know whether your wife kept any record of that? A. I believe my wife did, because she generally does, as a rule.

Q. Where is Dr. Moleski now?

The Court: Are you intending to object to that letter, Mr. Quinn?

Mr. Quinn: Yes.

The Court: The jury may be excused until a quarter of 2, and I will hear you both on that.

(At this point, at 12:17 o'clock a. m., the jury retired.)

The Court: I will hear you.

Mr. Offutt: I do not know the grounds of the objection, but I merely wanted to introduce that as corroborating this man's testimony that he worked 25 years for that employer, Harry F. Hare.

The Court: In view of your argument, I will have to sustain the objection.

75 Mr. Offutt: I think I will have to lay another foundation. I think the objection is well taken.

Mr. Quinn: Thank you.

The Court: I am sorry; I did not intend to excuse the jury until half past 12, but I had not seen the letter, and I did not know how serious this argument would be.

Mr. Offutt: I think that I can probably dispose of one other matter now. I will just move that this be admitted as Plaintiff's Exhibit No. 2, which has been identified as the bill rendered to him by Dr. Moleski, and it contains some papers. So I will hand that to Mr. Quinn and see if he objects to that.

Mr. Quinn: Certainly I object to it. It is a written statement in the nature of a doctor's report as to what this man's ailments were. The man is not here to be cross-examined or anything.

Mr. Offutt: How about the bill part. You do not say anything about that, that part of it.

The Court: There appears to be a re-stated bill here. What do you have to say about that?

Mr. Quinn: Re-stated bill?

Mr. Offutt: He testified that he did not pay him.

Mr. Quinn: He did not testify one way or the other about that.

The Court: No, it is not re-stated.

I will hear you, Mr. Offutt, if you desire.

76 Mr. Offutt: I think it is a bill rendered to him by the doctor. I may need some further foundation, but I think we can draw an inference from the fact that he was given a bill. It was on the doctor's letterhead and signed by somebody who is a doctor. If it was given to him in the regular course of business and he signed it, I think that section of our Code—

The Court: There may be some Code provision that I am not familiar with, but the view at common law would be that the statement was not evidence, but if he paid the bill that would be a different proposition.

Mr. Offutt: There is a Code section—I can get it for you; it refers to records kept in the regular course of business, and this sort of a record, if your Honor feels that that foundation is sufficiently laid in that the bill itself is sufficient from which your Honor can draw an inference that it was kept in the regular course of business, then it is admissible as an exception to the hearsay rule, and that was enacted by the Congress in 1936.

Mr. Quinn: This is not a part of any record.

The Court: It does not appear to me to be, but I would like to see the Code.

Mr. Offutt: It won't be in the District Code. It will be in the United States Supplement to 1934, Section 695.

Mr. Quinn: That is the supplement, the amendment
77 under which they have been admitting certain records of the Police Department where they are obliged under the law to make certain reports.

Mr. Offutt: No, that is a different section. I am referring to Section 695, Chapter 7.

The Court: Which volume of the United States Code Annotated is it in?

Mr. Offutt: If your Honor has the supplement, it is in that. If it is not, it is in the United States Code Annotated, Title 28.

Here it is; it is Section 695, page 48, of the Pocket Index:

"In any court of the United States, and in any court established by act of Congress, any writing or record, whether in the form of an entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such a transaction, occurrence, or event if it shall appear that it was made in the regular course of any business and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter."

Then it goes on to say that all other circumstances in connection with the making of such a writing or record
78 may be shown to affect its weight, but shall not affect its admissibility.

The Court: Gentlemen, under that statute, this clearly is not admissible. In the first place, the statute is in derogation of the common law rule. It would have to be strictly construed, and under no construction of a statute could I admit a bill sent by a physician to his patient.

Mr. Offutt: Very well, your Honor. I think that that is incorrectly interpreting the statute.

The Court: You except to my ruling. That is the best I can do for you, sir.

Mr. Offutt: Yes, your Honor.

The Court: The Court will take a recess until a quarter of 2.

After Recess

1:45 o'clock p. m.

After the taking of the recess, the hearing was resumed.
The Court: Proceed.

(Then there was a brief conference at the bench, not reported by direction of counsel for the defendant.)

Mr. Offutt: If your Honor please, may I show these photographs to the jury now, with that explanation?

The Court: Yes.

79 The Clerk: They have not been identified.

Mr. Offutt: I think they have been, but if they have not I will ask the question.

The Clerk: Three of them were marked; that is all.

Thereupon **William F. Traynor, Sr.**, the plaintiff, who was on the stand at the time of the taking of the noon recess, resumed for

Further Direct Examination

By Mr. Offutt:

Q. Will you identify those, if you can, Mr. Traynor?

A. Yes, sir, I recognize them.

Q. Are they pictures indicating the scene of the accident?

A. Yes, sir.

Q. Which occurred when you were hurt? A. Yes, sir.

Mr. Offutt: May I have them marked?

(Photographs of scene of accident marked Plaintiff's Exhibits 3, 3-A, 3-B, 3-C and 3-D.)

Mr. Offutt: While he is marking those, I will ask one other question.

Q. Were you ever examined by any other doctor except Dr. Lightfoot and Dr. Moleski and Dr. Warfield? A. No.

80 The one doctor from the Nu Car Carriers came to the house.

Q. That is the defendant in this case, the doctor that they sent to examine you? A. Yes.

Q. When did that take place? A. The doctor came from the Nu Car Carriers to 3315 Palethorpe Street. When I first

came downstairs, I was in Philadelphia, and he examined my body. He had my shirt taken off.

Q. Was Dr. Moleski there? A. No, he was not, but he had orders from the doctor—

Q. Unless you were present, about any orders— A. I remember that.

Q. Don't state any conversation. A. Yes, sir.

Q. You say this doctor did examine you? A. Yes.

Q. Do you recall his name? A. No, I could not. I could not recall his name.

Q. Were arrangements made so that he could come there and examine you on that occasion? A. Yes, sir.

Q. Was that in 1936, or the last part of 1936 or the early part of 1937? A. The latter part of 1936.

Mr. Offutt: (To the jury) I show you first Plaintiff's Exhibit No. 3. That shows the picture as you approach coming into Bel Air, with the exception that on the inside of the turn you will see a little white or light-colored bit of paving, and it is stipulated between counsel that at the time this accident happened, the edge of the roadway came out to the inside of the white—

Mr. Quinn: To the point.

Mr. Offutt: To the point on the white paving right on the inside of the curve, and there was also a hedge on the right side—let us put a mark there. You will notice as you examine this picture that there is a little pen and ink mark right where the roadway came; that is the edge of the roadway at the time this accident happened.

Also, where the grass is now located, there was a high hedge—is that correct?

Mr. Quinn: Bushes.

Mr. Offutt: You may take that and pass it around. Would that be all right, if your Honor please?

The Court: Yes, sir.

Mr. Offutt: On Plaintiff's Exhibit No. 3-A—that was 3—on Exhibit 3-A there is shown in the front of it a picture, a sign with the words "Dangerous Intersection" marked on there. It is the sign that he referred to coming toward the intersection from Bel Air.

I am showing you now 3-B, 3-C and 3-D.

82 Q. Now, you spoke about your son-in-law driving down from Philadelphia and carrying you back the next day. Was he your son-in-law at the time of this acci-

dent? A. No, but he was keeping steady company with my daughter. He was my intended son-in-law.

Q. But he is now your son-in-law? A. He is now my son-in-law.

Q. Since this accident happened in 1936, will you give the jury your estimation of what you have earned in the time when you attempted to work? How much money have you earned in that period of time? A. Since the accident?

Q. Yes. A. Well, it has not been very large.

Q. Give us your best estimate of how much it was. A. The best I can figure on, I would say about \$180, something like that. Roughly about \$180 during that time.

Q. That is, in all the time you worked? A. Yes.

Q. The work which you were employed to do with the Allen Steel & Iron Company, and which you said was steady employment, is that work still going on at the present time?

A. Yes, sir. My boy still works there.

Q. Was your boy working there at the time the
83 accident happened? A. My boy was heating rivets with me in the same gang; he worked with me in the same gang.

Q. Did you see your automobile after this accident occurred, the automobile in which you were riding? A. Oh, yes.

Q. How long after the accident happened did you notice what damage was done? A. About six months later when I came back to Washington to get it out of the garage at my sisters'.

Q. Did you see it prior to that time at all? A. When I got out of the car, just a glance at it; when I got out of the car at the house, when they were carrying me in.

Q. When you were carried back from the doctor at Bel Air, did you see the car then? A. I don't remember it.

Mr. Offutt: Will your Honor indulge me just a moment, please?

That is all at this time. You may examine him.

Cross Examination

By Mr. Quinn:

Q. Mr. Traynor, let me see how much you remember now. You remember approaching the curve, the intersection of Broadway and Conowingo Road? A. I do.

84 Q. Is that correct? A. That is right.

Q. You remember the little rise a short distance beyond the intersection? A. That is, coming into the intersection?

Q. Coming in from the direction you were traveling. A. Yes.

Q. About how far is that rise from the intersection? A. Well, I would say about 350 feet, guessing at it now.

Q. I show you Plaintiff's Exhibit 3-B and ask you if that rise is indicated on that photograph. A. Yes, it is on the other side that rise starts coming into it; yes, it starts on the other side of that, at the top of that hill.

Q. When you get right there where my pencil is pointing, that is the top of the rise, is it not? A. Yes, sir.

Q. Then you come down grade toward the intersection? A. Yes, sir.

Q. And you think it is 300 feet? A. You mean, on this side of it?

Q. From the top of the rise, right where you start down toward the intersection. A. That is 79 feet.

85 Q. So you are downgrade for a distance of 79 feet after you hit the top of the rise.

Did you slow down there? A. I slowed down just the minute I was coming to the top of the intersection, at the sign.

Q. What did that sign there say? How many miles an hour? A. Twenty-five.

Q. You are sure of that? A. That is what I saw on the sign.

Q. Didn't that sign say 20 miles an hour? A. No, sir.

Q. Don't you know that the 25-mile sign is a considerable distance back of that rise? A. That is the sign I am speaking of.

Q. I am speaking of the sign right near the top of the rise. A. The sign I am indicating at is the sign before I got to the top.

Q. Did you see another sign closer to the intersection that said 20 miles an hour? A. I did not read that. I read the "Dangerous Intersection" sign.

Q. You remember coming down the grade toward that intersection, and you were going about 18 or 20 miles an hour? A. Yes.

86 Q. And you remember distinctly that you looked at your speedometer? A. I do, yes.

Q. And that is how you know what speed you were going? A. Yes.

Q. And you remember that you started to make a turn—is that correct? A. That is right.

Q. Did you get around the curve? A. Just started, as I was just starting around the curve.

Q. Did you get around any part of the curve at all? A. The front of my machine was just going around the curve.

Q. Do you remember that right opposite the intersection, on the other side of the intersection, looking from the distance, the direction you were traveling, there is a road that continues into Bel Air, a street? A. Yes. It was right on down there.

Q. That is indicated as I put it here (indicating)? A. Yes.

Q. This part here (indicating) goes into Bel Air? A. Yes.

Q. And you came down this way (indicating) and were going to make a turn into Broadway? A. That is correct.

87 Q. This is Broadway and this is Conowingo (indicating). You were coming in this direction and you were going to make that turn (indicating)? A. Yes.

Q. Had you gotten around this corner here, this curve? A. Had I gotten around? Part of my machine was just going around that curve.

By Mr. Offutt:

Q. Will you show us where your machine was? A. There is a center line through there.

By Mr. Quinn:

Q. Does it go right around the curve? A. Yes. That is it.

Q. You are positive that there was a white center line there? A. Yes.

Q. At the time of this accident? A. Yes, sir.

Q. And went around the curve, continued on around the curve? A. Yes.

Q. You are very positive of that? A. Yes, sir.

Q. Show us where your machine was, and put your machine where it was with reference to the center of the

88 road. A. I will draw the machine in accordance with the line. The machine was like this (indicating).

Q. Is that the way your machine was pointed? A. Yes, sir, going right this way (indicating).

Q. You had, then, come up this way (indicating) and turned right about face? A. Yes, but it was closer to this curve.

Q. Put it in the position it was. A. My machine was like this (indicating).

Q. That is your machine? A. Yes.

Q. In other words, you had gotten around here (indicating) and pointed up—straight up Broadway? A. Right down this way (indicating) and made the turn and started around.

Q. When you got in that position, where was this Nu Car Carrier truck? A. Do you want me to put it as I saw it?

Q. Yes, when you first saw the truck. A. When I first saw the truck, this (indicating) is the turn, and this (indicating) is where the truck first came down.

Q. Put where it was. A. That truck came right across like that (indicating).

Q. The first time you saw the truck was when you had completed your turn and were facing up Broadway?
89 A. My turn was not complete.

Q. Most of your car was into Broadway? A. Yes.

Q. You were pointed straight up the road? A. Yes, sir.

Q. Your car had straightened out, practically, just about the way you have it there? A. Yes.

Q. And the first time you saw the truck, it was in that position? A. Yes, starting for me.

Q. Starting for you over the line, and about how far do you say he was away from you? A. Well, I seen him heading right over the line. He was heading toward me. It appears to me he was coming right into me.

Q. About how far do you think he was from you when you first saw him? A. Not more than 4 or 5 feet away.

Q. Indicate what you mean by 4 or 5 feet. Point to something in this room. A. For instance, as I was driving the car, as I saw it before the accident, I am coming down here—

Q. No; tell us how far he was. Point to some object in the room. A. About that far away from me (indicat-

90 ing). He come on top of me so quick I did not see him.

Q. From the end of the table to the end of that black-board? A. Yes, that is the way it appeared to me.

Q. The front of his car was about that distance from you? A. Yes.

Q. Did you see that truck at all when you first started to make that turn into Broadway? A. No, sir.

Q. You did not see him until you came into that position (indicating)? A. No, sir.

Q. What part of your car did he strike? A. The car was struck right where I was sitting

Q. What you saw. A. The front door on the left-hand side, right down, tore the whole side.

Q. Did you have time to turn out of the way at all? A. No, sir, I did not have time.

Q. He came into you just like that (indicating)? A. Yes, sir.

Q. How fast do you think the truck was going when you saw him 4 or 5 feet away? A. I could not just gauge his speed, because he must have been going a whole lot faster than I was. At that time I did not have much time
91 to gauge anybody's speed.

Q. What happened to your car after the truck hit it? Where did it come to a stop? A. Right at the accident; right there were he hit me.

Q. You mean it stopped right where you have it? A. Yes, sir.

Q. Was it turned around at all? A. That I do not know. After he hit it, I do not know.

Q. How do you know it stopped right there? A. Because I made the effort to stop.

Q. You mean you put on your brakes? A. I made the effort to stop when I saw him coming toward the curve, and all I remember was a shot.

Q. When you were taken out of your car, where was your car? Up against the curb? A. That is the position I did not see the car. I was taken out of the car.

Q. As far as you remember, you don't know what happened to your car after it was hit, as to whether it was pushed or turned around? A. I can't say yes. I don't know.

Q. Do I understand you to say it was a dry road? A. It might have been a little damp.

Q. Didn't you say on direct examination that it was dry?

A. Yes, it was fair, dry. It had been raining; I verified that. It had been raining, but by the time we got there it was cleared up.

Q. How soon before this accident had it stopped raining?

A. Quite a ways down the road.

Q. Don't you know it was a drizzling rain just as you approached that intersection, and the road was wet? A. Do I know it?

Q. Yes. A. No, sir; I did not see it rain.

Q. Was the road wet? A. The road might have been a little damp.

Q. Why didn't you tell the jury that at first, when you said it was dry?

The Court: Mr. Quinn, I think his testimony corresponds to his testimony in chief.

Mr. Quinn: My impression was that he said it was dry.

The Court: No, he did not testify it was dry.

By Mr. Quinn:

Q. Mr. Traynor, I ask you, what is your best recollection as to the condition of the road? Was it wet, or dry? A. It was fair. It was not exactly dry. It was damp—right after a rain, it was damp looking, but it was fairly dry.

Q. Did you skid at all as you went to turn around? A. No, sir, I did not skid. I had four brand new tires on the car, and I don't remember skidding.

93 Q. Showing you Plaintiff's Exhibit 1, that was the condition of the side of your car at the time that that photograph was taken? A. Yes, sir.

Q. And that was the condition of the car right after the accident? A. Yes, sir—just a minute. Understand, that is another wheel that the boy put on there.

Q. But the side of the car was the same? A. Yes, sir, the side was never touched.

Q. Whose car was it? A. My son's.

Q. In your declaration you claimed that the car belonged to you, and you asked for damages for the demolition of the car. A. I beg your pardon. I did not. I never professed to own the car.

Mr. Offutt: That is an error which Mr. Fonbuena made. We made no argument about the damage, and withdraw it at this time.

The Court: I think the examination is admissible if there is a statement in the cause of action which is contrary to the statement made by the witness. I think the witness can be interrogated about it.

Mr. Offutt: I am just stating that we make no claim about it. We are not pressing it.

94 By Mr. Quinn:

Q. The declaration, Mr. Traynor, says that "Plaintiff's automobile"—that is your automobile—"was damaged beyond repair," and thereby you sustained damages for the full value of the automobile, to wit, \$200. You say that the automobile did not belong to you? A. That automobile does not belong to me.

Q. It did not belong to you at the time of the accident? A. No, sir. It was my son's car.

Q. Now, then, the last thing that you remember is the truck as it was coming toward you in the position you have indicated on the blackboard, and the crash? A. That is right.

Q. You do not remember anything about the position of the machines after the collision? A. No, I do not.

Q. Then, I think that you remember going to the doctor's? A. I remember going in the doctor's, yes.

Q. Do you remember the doctor examining you? A. I would not know him if I seen him.

Q. Do you remember the doctor examining you? A. I remember, as I said in my statement, the doctor standing me up and his hands was feeling me all around. I could not hardly see him. I was almost blind.

95 Q. Do you remember the doctor discharging you and telling you you had nothing seriously wrong with you? A. No, sir, I cannot recall his saying a word to me.

Q. Do you remember going down to the justice of the peace? A. I remember only that much, that I remember being in front of a building, and heard them charging them, like, and talking about something, but I did not know what it was all about.

Q. Did you know you were before the justice of the peace and were being charged with reckless driving? A. No, I don't recall that.

Q. Do you recall the justice of the peace himself coming out to the machine that you were in? A. No, sir.

Q. Judge Spencer? A. No, sir.

Q. Do you remember telling Judge Spencer that you could have made that curve if the road was not wet, if you had not skidded? A. No, sir.

Q. Do you deny saying that to him? A. I *do* not say it. I never heard that before.

Q. You never heard that before? A. No, sir.

Q. Who paid the fine? A. From what I understand, my son paid it.

Q. Did you know you had been fined a dollar and costs? A. My boy told me afterwards.

Q. You don't remember about it at the time? A. No, I don't remember that.

Q. When did your son tell you about it? A. When I got home. He has told me several times.

Q. Do you remember signing a paper for the young man who was driving the truck, in which you exonerated him? A. No, I don't recall signing any paper.

Q. And then you recall—the next thing you recall is over where? A. I did not get that.

Q. What was the next thing you recall, after being at the doctors's? A. The first thing I can really remember after coming from the doctor's was my boy putting a blanket around in that car to keep me warm. That is when I first regained my consciousness enough to know I was on my way to Washington.

Q. You were on the way to Washington? A. Yes, sir, in his coupe.

Q. What part of the road do you think you were on? How far from Bel Air? A. That is a question I cannot answer.

Q. Were you seated in the front of the car? A. Yes, sir, along side of my son, in the coupe.

Q. You remember his putting the blanket around you? A. I remember his putting the blanket around me.

Q. Then you remember arriving at Laurel? A. I remember arriving at Laurel, yes, and then, before that, I remember my son going out to telephone, and he said he had been back several times, but I don't recall that.

Q. You don't recall that? A. No, I had forgotten about it.

Q. Do you remember a policeman at all? A. No, I don't.

Q. You don't remember seeing this man in uniform? A. I don't remember. I can't recall him. I would not know him if he was to walk up to me.

Q. Do you remember the cop driving you to the doctor's? A. No, I don't. I would not know him if he come in now.

Q. You said you earned \$180, I think; that is all you had earned since this accident? A. Yes.

Q. Is that correct? A. That is about as near as I can figure it out.

Q. Whom did you work for in earning that? A. Budd Manufacturing Company.

Q. Budd? Where is that located? A. 258 Hunt
98 and Park Avenue.

Q. Philadelphia? A. Yes, sir.

Q. When did you work for them? How long after this accident. A. Quite a while after the accident. It was about four or five months after the accident; about five months after the accident, I guess.

Q. How long did you work for them? A. I worked for them about three months.

Q. Five months after this accident you went to this place you just mentioned, and you worked there for three months or about three months? A. Yes.

Q. Is that where you earned \$180? A. Yes.

Q. That was three months steady? A. Yes, steady work.

Q. Is that the only place you worked? A. That is all.

Q. This accident happened in October, 1936, October 17? A. 1936, yes.

Q. About five months after that accident, you were then working for them in the spring of 1937? Is that correct?

A. Yes.

99 Q. No doubt about that? A. It is 1937 I was working; I know that much.

Q. About five months after the accident? A. Yes, about five months after that, as near as I can judge.

Q. You were working for them before this suit was brought? A. Before the suit was brought?

Q. This suit was brought in August, 1937. A. Yes.

Q. You were working for them before this suit was brought, working for them for about three months? A. That I cannot get in my head.

Q. How did you fix the time as five months after the accident? A. I am guessing as close as I possibly can, according to the best of my memory.

Q. I do not want you to be mistaken about it. In October the accident happened, and then to December 17 would be two months, January 17 three months, February 17 four months, and March 17 five months. Was it in the spring of that year you went to work for them? A. It was in warm weather, I know.

Q. And you worked for them for about three months? A. Yes.

100 Q. Have you any data there to indicate just when you started to work for them? You went to figure something when counsel asked you how much you had earned. Did you have any data as to when you went to work for these people?

The Court: Have you a memorandum?

The Witness: No memorandum.

By Mr. Quinn:

Q. What did you write on at that time? A. Just a letter in my pocket. I did not write nothing as I remember.

Q. I would like you to search your mind and give us the exact time you went to work for these people. A. I have already done the best I can on that, according to my recollection.

Q. You figure that at five months after the accident happened? A. About as near as I can get to it.

Q. You don't think it was any longer than that? A. It may have been a little. It may have been shorter.

Q. How much longer would you say it might be over five months?

The Court: He did not say it might be.

Mr. Quinn: I asked him, if it was longer, how much longer does he think it would be.

The Witness: That I cannot answer.

101 By Mr. Quinn:

Q. That work that you were doing for that company was a sort of riveting on rivets in automobiles? A. No, sir; that same kind of work would apply the same thing as do buildings. A rivet is a rivet, no matter where driven. In stainless coaches, in these streamlined coaches for the Santa Fe Railroad Company.

Q. The same as putting up buildings? A. The same kind of a rivet used in it.

Q. How long were you in Freedmen's Hospital after you arrived in Washington? A. From the time I got there?

Q. Yes. A. Only long enough to receive treatment.

Q. What treatment did you receive? A. When they took me in there, they examined me all over that very same night that the accident happened, and they bandaged me all up and tied and strapped me and gave me some kind of pills to take. That is the treatment I received. I would call it a first-aid treatment.

Q. Did they take any X-rays? A. No, sir.

Q. Did you ever have any X-rays taken? A. No, sir.

Q. Either in Washington or Philadelphia? A. No, 102 sir.

Q. Was your address at the time of this accident 3315 North Palethorpe Street, Philadelphia? A. Yes, sir.

Mr. Quinn: I think that is all.

The Court: Any more questions?

Mr. Offutt: Just a couple of questions, if your Honor please .

Mr. Quinn: Just one minute.

Q. When you went to Philadelphia from Washington, after your son-in-law came for you, you rode along in an automobile? A. Yes, sir.

Q. What kind of a machine was that? A. He had a brand new Pontiac at the time.

Q. A sedan or coupe? A. Four-door sedan.

Q. Where did you sit in the car? A. I sat right alongside of my wife, in the middle of the car, and my son on one side and my wife on the other.

Q. When you came from Bel Air to Laurel first in the coupe, before it stopped, you rode alongside of your son, sitting up in the car? A. Yes, sir.

Q. And then from Laurel to Washington you came in your sister's car, and you sat in that car and rode in to 103 Washington? A. Yes, sir.

Q. Were you conscious when you were coming in from Laurel to Washington? A. At times—I couldn't say whether I was conscious or not, because I was like a mad man; I don't know what I said or done or anything. All I know, I suffered all the time. I don't remember seeing streets as I was going through. I was in agony and pain. I cannot say whether I was conscious or whether I was not.

Mr. Quinn: I think that is all.

Redirect examination

By Mr. Offutt:

Q. When you retained Mr. Fonbuena to represent you, did you give him any information showing the ownership of the car? Did you give him a registration card, or anything of that kind? A. There was a registration card of my son's—

Q. Did you give it to him? A. It was sent to Mr. Fonbuena and Mr. Quijiana at the same time.

Q. That was Mr. Fonbuena's associate? A. Yes, sir.

Q. Will you examine this and state what it is? A. Yes, sir.

Q. Is that the registration card you sent to Mr. Fonbuena? A. That is the card. That is William Traynor; that is William Traynor's card. That is my son's card.

Mr. Offutt: Will you mark that No. 4 for identification?

(Registration card of William Traynor marked Plaintiff's Exhibit 4 for identification.)

Q. Did you know, when suit was filed, that it had been filed and that damages had been asked for the car and that it was stated that you owned the car? Did you know that the suit which had been filed in your behalf asked for damages for the destruction of the car, and stated that the car was owned by you? A. No, sir.

Q. Did there come a time when you learned that? A. I just learned it now. As far as I know, that is news to me. I never owned that car.

Q. Did you ever tell Mr. Fonbuena or Mr. Quijiana that you owned it? A. No, sir.

Mr. Offutt: Is there any objection to that, Mr. Quinn (handing Mr. Quinn a paper)?

Mr. Quinn: Give me a chance to look at it.

By Mr. Offutt:

Q. This diagram that you were looking at, do you know what the width of the road was from here to here
105 (indicating) on the day of that accident? A. I stepped it across.

The Court: Seventeen strides, as I remember.

By Mr. Offutt:

Q. Nine strides? A. Nine strides across there. I stepped it across; nine strides from the curb to the outer edge of the road, to the break of the concrete on the opposite side.

Q. Was it nine strides on this side of the road (indicating)? A. From this curb line (indicating), right across from where you are.

Q. From here to here (indicating)? A. Yes, sir.

Q. Did you measure the road from this part (indicating), Broadway Avenue? A. Yes, sir. They seemed to step off about the same.

Mr. Quinn (referring to the paper that had been handed to him): I have no objection.

Mr. Offutt: No objection, Mr. Quinn says. I offer it in evidence.

(Unidentified paper offered in evidence as a plaintiff's exhibit.)

Mr. Offutt: Call George Moleski.

106 Thereupon **George Ignatius Moleski**, a witness of lawful age, was produced as a witness on behalf of the plaintiff; and, after being first duly sworn, was examined and testified as follows:

Direct Examination

The Court: Do you gentlemen want that blackboard as it is, with these other men coming in?

Mr. Offutt: I have no objection.

Mr. Quinn: I have no objection.

By Mr. Offutt:

Q. What is your full name? A. **George Ignatius Moleski**.

Q. Where do you live? A. 2626 East Allegheny Avenue, Philadelphia, Pennsylvania.

Q. Where are you employed, Mr. Moleski? A. I am now on active duty in the Navy Yard, Scout Squadron 5, Reserves.

Q. Of the United States Navy? A. Yes, sir.

Q. Did you bring with you certain records of Dr. Moleski's office relating to the treatment of William F. Traynor, Sr.? A. Yes, sir.

Q. What relation is Dr. Moleski to you? A. He was my father.

107 Q. Is Dr. Moleski alive today? A. No, sir. He died on the 31st of August.

Q. 31st of August of this year? A. Yes, sir.

Q. Did he die suddenly or as the result of a prolonged illness? A. After two weeks' illness.

Q. Mr. Moleski, your father's name was Dr. Ignatius Moleski? A. Yes, sir.

Q. Did he have his office at his home, or some other place? A. At his home, sir.

Q. Did you live at home? A. Yes, sir.

Q. Are you familiar with his business, that is, the way in which he kept his office records? A. Yes, sir. I often helped.

Q. When you helped him, did you help him prepare bills? A. I helped him write out the records that he kept at home, and he mailed the bills himself.

Q. Now, since he has died, are those records still in your house? A. I have charge of those records now. We are preparing to send out bills to collect some moneys due us now.

108 Q. You have charge of them now? A. Yes, sir.

Q. Are those records in his own handwriting, the ones which he prepared? A. Yes, sir; all the case histories and the money owed us are in his own handwriting, kept on small index cards.

Q. Do you have the record with you, from his files, pertaining to the treatment and his attention given to William F. Traynor, relating to treatment on and after October 17, 1936? A. I don't know exactly the dates, but I have the records relating to the Traynor case. They were kept in a separate envelope, and we found them among Dad's records.

Q. Will you produce them? A. Yes, sir.

Q. Were these records kept, to your knowledge, in the regular course of his business in connection with his operating as a practicing physician? A. Yes, sir.

Q. He did practice medicine in Philadelphia, to your knowledge? A. Medicine and surgery.

Q. How long did he practice there, if you know? A. I think seventeen years now.

Q. How old are you? A. Nineteen.

109 Q. You don't know that he has practiced seventeen years of your own knowledge? A. I had a file out, quite a few papers, after he died, and we had a reference to how long he did practice, and that is how I know he practiced for seventeen years.

Q. I show you these which are taken out of this envelope that you have given me, and ask you if you will explain to the jury what they are. A. Right here is a resume, more or less, in Dad's own handwriting and on his own letter-heads of the case history and of the dates of the different visits he made and that Mr. Traynor must have made to the office, and the outline of the complete bill beginning on the 19th, the tenth month, in 1936, and the final entry was made on the 18th, sixth month, in 1938. The total bill as given here—

Q. Just a minute.

Mr. Quinn: Just a moment.

Mr. Offutt: Will you mark these for identification?

(Dr. Moleski's record marked Plaintiff's Exhibit 4 for identification.)

By Mr. Offutt:

Q. I show you these two sets of cards, with clips upon them. Will you look and see if there are any other cards in there? A. No, sir.

110 Q. These are intact as you found them among the records? A. Yes, sir.

Q. Will you state what these two sets of cards are, but do not read the contents of them. A. These are case histories and the records of the visits that the other list was made up from. These are the definite way that Dad keeps his records.

Q. Is that the manner in which he keeps the records pertaining to other cases? A. Yes, sir.

Q. State whether or not they are in the handwriting of your father. A. They are in Dad's handwriting.

Q. And these—state what they are.

(At this point, file of Dr. Moleski's correspondence was marked Plaintiff's Exhibit 5 for identification.)

A. This is correspondence.

Q. Don't mention whom it is from. A. This is correspondence referring to the case that I found among the records. That is about all I do know about it.

Q. Nothing in there in your father's handwriting, or anything? A. No, sir.

Q. This notation on the outside of the envelope, is
111 that in your father's handwriting? A. Yes, sir.

The Court: Mr. Quinn, have you any objection?

Mr. Quinn: Yes, your Honor.

The Court: The jury will be excused.

(After the jury had retired:)

Mr. Quinn: May I see those? May I look at them? This is something new.

Mr. Offutt: I don't know whether I asked this question or not.

Q. Did your father operate his office at 2626 East Allegheny Avenue in Philadelphia? A. Yes, sir.

The Court: What volume is that?

Mr. Offutt: Title 28, Section 695. It is in the Pocket Index. That is the reason I missed it before.

Mr. Quinn: May I ask a question, if the Court please?

The Court: Yes.

By Mr. Quinn:

Q. Do I understand you to say, Mr. Moleski, that what is on this paper was made up from data on these cards? A. I could not say that under oath, but what is on that paper refers to the various visits on that card. I have not gone through those things completely. I just brought them from Philadelphia, and I picked those out of the records
112 with reference to the Traynor case.

Q. Did your father keep a card index case? A. Yes.

Q. And did he keep little cards like this? A. Yes, sir.

Q. Where did you find these? A. That was in an envelope.

Q. A separate envelope? A. Yes, sir.

Q. Did you say there was a letter in reference to it? A. There is correspondence with reference to it in the envelope.

By the Court:

Q. Was it his practice to make just a card, or did he transcribe from the card, as a rule, and put the transcription on paper? A. My dad generally entered his case histories upon the index card, and at times when he did not want to go back to get the index card out of the files, he often wrote it out on these white sheets.

Q. As far as you know, is all the information contained on the white sheets also contained on the index cards? A. I cannot say, because I have not thoroughly gone over it.

The Court: Are the cards sufficient for your purposes?

113 Mr. Offutt: I only had a brief moment to examine them.

The Court: I am prepared to rule on the cards now.

Mr. Quinn: I object to both the cards and the letters. As I view the statute, it does not cover the matters which are in the shape of opinions or comments by anyone who might keep a record, and in the doctor's cards you will find just that vice.

The Court: I had some doubt about that part of it, but I presume that what the counsel would like to have is the memorandum of the aggregate of the doctor's bill, is it not?

Mr. Offutt: That is one of the things we want; that is the principal thing we want, but we also want and we think it proper to have everything he made in the way of a memorandum.

The Court: I have some doubt about it; I have some doubt about anything else excepting the figures representing the doctor's bill, and I will admit the cards. I will have to rule separately as to the other papers, after looking at them more carefully.

The Witness, as I understand the substance of his testimony, says that those separate papers were made up from the cards, and that it was not his general practice to make up the separate papers, but usually just use the cards.

I am prepared to admit the cards.

Mr. Offutt: Very well, your Honor.

May I ask him one other question?

Q. You mentioned that your father usually in the
114 regular course of his business made out these cards.

A. Yes, sir.

Q. And I understood you to say that he would sometimes make it on a white sheet of paper like this? A. Yes, sir.

Q. When he would make it that way, would he—

The Court: No; what he said was, as I understood him, that sometimes he would transcribe from the cards to white sheets, but I don't think he stated—I may have misunderstood that—that he ever made out those white sheets as original entries.

Mr. Offutt: That is what I want to try to find out now.

Q. When he would use the white sheet of paper, can you tell us whether he would make out the white sheet of paper first and then later make out the cards? A. I could not make a general rule for that at all. At times, when he did not have index cards and he did have his letter paper on the desk, he made his case history on the desk and transferred it to the index card, but after looking through these cards, and that sheet, my conclusion is, from those cards, that he made up that sheet which is a general resume of the money owed him.

The Court: With that statement, the Court cannot admit those sheets, because the witness himself does not know what the sheets represent.

115 Mr. Offutt: The unfortunate part is that these cards do not seem to tally exactly with these. There is a great difference, if I can show it to your Honor. It would be impossible for him to take these cards and make these sheets.

The Court: The difficulty, Mr. Offutt, is this: As I see it, one fundamental difficulty is that the statute does not permit a guess as to what the nature of the entry is, and, as I see it, the witness is uncertain as to whether the card or whether the papers in this particular instance represent the original entry, and you have just stated that they do not appear to correspond.

In view of that situation, the Court is inclined to think that it ought to sustain the objection as to both the cards and the papers, because certainly they have to be identified. There is nothing in the statute that says you can guess at what they are.

Mr. Offutt: But does not the statute say all memoranda, and I suggest that since the weight is the sole thing which has to be decided after it is admitted, and that that can be attacked only by rebuttal—since they are part of all of the

record, and the maker is deceased, and since no one is complete without the other, they must be one of these incomplete records.

The Court: If you had not stated to me that the cards and papers did not show the same thing, I would not have any difficulty. Under the circumstances, I cannot
116 admit either. I am very sorry, because it may be that the jury could get some information from it, but if they don't correspond I do not see how you can introduce them.

Mr. Offutt: Very well.

May I have an exception?

The Court: Certainly.

Mr. Offutt: Since your Honor has ruled them out.

The Court: The reporter will take this down.

The Court's ruling is based on the statement of Mr. Offutt that the entries on the cards and the entries on the papers do not appear to correspond.

Mr. Offutt: Well, if your Honor please, in this respect, may I, for the record—

The Court: Of course. We want to get it right.

Mr. Offutt: In this respect, of course, I only briefly examined them. If your Honor will let me examine them a minute, I will check them date by date, but I mean that the cards do not show the number of visits that the written memoranda on the paper show.

The Court: You won't be able to conclude this case today, and I am wondering if it would suit both sides for you to bring that matter up in the morning, and see if those papers in your judgment can be reconciled, and then the Court will see if they can be.

Mr. Offutt: This young man is down from Philadelphia.

117 The Court: As far as the Court is concerned, he may go back. The only thing before the Court now is the admissibility of those papers.

Mr. Offutt: I also want to attempt to introduce these letters, too. I can do that tomorrow. They have been identified already.

The Court: Yes.

Mr. Offutt: That is all.

Mr. Quinn: That is all.

Mr. Offutt: May he be excused? He is on leave from the United States Navy.

The Court: Of course, he can be excused, but if you omitted anything you will have to take that chance.

Mr. Offutt: Yes, your Honor.

The Court: It is your responsibility.

Mr. Offutt: Yes, your Honor.

(After the jury returned:)

Thereupon **William F. Traynor, Jr.** was produced as a witness on behalf of the plaintiff; and, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

118 Q. Your name is William F. Traynor? A. That is right.

Q. Your father is the plaintiff in this case? A. Yes, sir.

Q. Where do you live? A. 2719 North Fifth Street, Philadelphia.

Q. Where were you living on October 17, 1936, when your car was in an accident with a truck? A. 3315 Paltorpe Street, Philadelphia.

Q. Directing your attention to that day, will you state who owned the automobile which was in the collision on that occasion? A. I did.

Q. Who was operating it at the time of the accident? A. My father was operating it, with my privilege.

Q. What time did you leave to go on the road on which this accident occurred? A. As I recall, it was around 4 o'clock in the morning.

Q. Where were you going? A. We were coming to Washington.

Q. Where did you leave? A. We left Philadelphia.

Q. Left where you were living on East Palethorpe Street? A. That is right.

Q. What kind of a day was it? Clear day, or
119 rainy day, or what was the weather? A. When we left our house in Philadelphia, it had been drizzling, but within about a couple of hours it had stopped altogether, and it look liked it was going to clear up.

By the Court:

Q. What time was it when you got to Bel Air, if you remember? A. When we reached Bel Air, I believe it was somewhere around 7:30 in the morning.

By Mr. Offutt:

Q. As you came into Bel Air—where did this accident happen, inside or outside of Bel Air? A. It was in Bel Air.

Q. As you came to the point where the accident occurred, will you state at what speed your father was operating the car, if you know? A. At the place where the accident occurred?

Q. Just before the accident happened. A. Just before the accident, we had been driving along about 30 miles an hour, and I mentioned to my father that there was a stop sign there that says 25 miles an hour.

Q. Did the stop sign say 25 miles an hour, or 20 miles an hour? A. 25 miles an hour.

Q. Where was that stop sign that you mentioned as 120 25 miles an hour located? A. That was located about a block before the intersection, on the right-hand side of the road.

Q. Where did the accident happen? A. The accident happened right at the intersection. There is a curve there which turns to the right.

Q. Can you draw a diagram of where this accident occurred?

The Court: Hadn't you better go ahead? He states that they were driving about 30 miles an hour and he called his father's attention to the sign. Go ahead from there.

By Mr. Offutt:

Q. When you called your father's attention to the sign of 25 miles an hour, what if anything did your father do? A. Then my father slowed down. He said, "We are doing about 20 now. I guess that ought to be all right."

Q. What was the speed of the car at that time, in your judgment? A. As near as I can judge, around 18 to 20 miles an hour.

Q. How do you base your judgment? A. I have been driving a car for about eight years myself, and drove with my father since I was 9 years old. I am 34 now, and I have

a pretty good idea of the speed of a car, because I have been in them all my life.

Q. That is the way you fixed the speed? A. I did not look at the speedometer, but I could judge that it
121 was approximately that.

Q. Tell in your own words how this accident occurred, where you were driving—before you do that, let me ask one further question.

You say your father reduced his speed to 18 to 20 miles an hour, in your judgment? A. Yes, sir.

Q. How far were you from the intersection when the speed of your father's car dropped to 18 to 20 miles an hour? A. I would say at least 75 feet.

Q. Explain in your own words how this accident occurred. A. We were traveling toward Baltimore, and we come to this intersection on the Conowingo Road. This curve turns to the right, and there are two joining roads. One is a private driveway, and one, I believe, runs into Bel Air—I am not acquainted with the town—and the main highway which we were on is the one which turns to the right, and as we approached the curve there was a high hedge on the right-hand side of the road at that time, and we slowed down and started to come around the curve when I noticed this truck of the Nu Car Carriers coming for us, and as I looked at that truck, my father pulled the wheel as far as he could to the right-hand side of the road. It did not appear there was much room to get through there; you could not have got a car through there, in fact, and all I remember
122 is pulling his wheel as hard as he could to the right hand side, and then there was a crash.

Q. When you saw the Nu Car Carrier truck coming toward you, when you first saw that truck, how far was it from the automobile in which you were riding? A. When I first saw the truck, it appeared to me to be about 15 feet away from us.

Q. Point out something in this room which in your judgment is the distance the truck was from your car when you first observed it. A. I would say from here to the first pew there.

Q. You mean the first seat? A. Right down there (indicating).

Q. Over here (indicating)? A. That is right.

Q. Where that coat is? A. Yes, sir. That is probably a little bit farther.

Mr. Offutt: May we agree on that distance?

Mr. Quinn: Yes, I will, if you agree that this is a church. (Laughter.)

I would say it is more than 15 feet. I would say at least 20 or 25, or 30, maybe.

Mr. Offutt: Does your Honor know the length of the court room? I do not know.

Mr. Quinn: We can measure it.

Mr. Offutt: All right.

123 Q. Now, with respect to the road itself, the road here, what was the condition of the roadway on the morning of this accident, dry or wet? A. The road naturally—it had been raining a couple of hours before, and it was still damp, the road, but it was in fairly good driving condition.

Q. With reference to the center of the highway, where was your car before the collision and at the time of the collision, on the side of the center or in the center? A. To the right side of the center. In other words, we rode—there is a white line there in the center of the road, a marker for you to stay in.

Q. Was there a line there on the day that this accident occurred? A. Yes, there was.

Q. How far was your car from the right-hand side of the roadway? A. At the time of the accident, when the crash occurred?

Q. At the time you first saw the other car. A. About 2 or 3 feet from the curb line.

Q. Your car was 2 or 3 feet from the curb line? A. That is right.

Q. Is that the curb line that was on the side where the hedge was? A. That is right.

124 Q. How far were you from the center of the curve—where were you with reference to the corner of the curve when you first saw the truck? A. We were right about the center of the curve when I first noticed the truck.

Q. Did you observe the truck from the time you first saw it, about as far as from where you are to that first seat, until the collision occurred? A. That happened so quickly I did not have much time to be looking at the truck. In other words, I just observed everything as quickly as I

could, and I took in the space that we had in front of us, and the distance between us.

Q. You did watch the truck and observe the conditions there? A. Yes, I did.

Q. Did you estimate in your mind the speed of the truck?

A. I could not truthfully say I could estimate the speed of the truck, but I know it had been coming at a pretty good rate.

Q. I am talking about from the time you first saw it until the collision occurred. Could you fix the speed then?

A. No.

Q. Where was the truck with reference to the center of the road? A. Due to the fact that I was not driving
125 the car, but sitting on the opposite side of the driver's seat, I could not notice the center line as much, but it appeared to be awfully close; in other words, it had been overcrowding the line.

Q. When the collision occurred, was the truck on your side of the road or on its side? A. It was on our side of the white line.

Q. How far was your car from the white line when the collision occurred? A. There was about 2 or 3 feet to the left of our car, that is, on the driver's side, to the white line when it happened, because we had pulled over to the right-hand side as far as we could get.

Q. What part of your car was struck by what part of the truck? A. The left front of the truck struck the left rear side of our car.

Q. What happened then? A. That is as much as I can remember just for a minute, because it knocked both my father and I out at the time.

Q. What next happened that you observed at the scene of this accident? A. The next thing I remember was when I had sort of opened my eyes, I guess when I was knocked
out.

126 Q. What did you next see happen or occur there?

A. The truck that hit us had been backing up, away from the accident, over to the curb.

Q. Did you see it back up? A. I saw it back up, yes.

Q. When you saw it back up, where did it back to? A. To the right-hand side of the curb on his side.

Q. When he was backing up, was his truck over on the wrong side of the white line, over on your side of the white line, when you first saw it? A. After the accident?

Q. After the accident had happened. A. It was on his side of the line after he backed up.

Q. When he began to back up, was he over on your side of the line? A. That I could not very well tell you, because I was practically standing on my head inside of the car.

Q. When the Nu Car Carrier truck backed up, what if anything happened to your car? A. The channels on the truck had smashed the roof of our car in, and had broke the side in at the door post and drove that up against my father, and they ripped the running board loose and the rear fender, and it bent the left rear wheel completely in half, and blowed out the tire on the right rear side.

Q. Did your car move any when the truck backed
127 up? A. I felt the car give a jolt just as I opened my eyes, and it felt to me that the car had just fell down, like.

Q. Did you see the car move any way at all? A. No, I did not see it move.

Q. Then what if anything did you do? A. Right then I got out of the car, and there had been a package in the back of the car; it contained some medicine which I had to take, and I reached down to the ground, and it was very important for me to have it, and I just had the presence of mind to pick it up before another car would run over it, and I walked around to the other side of the car and expected my father to get out, and I seen he was hurt—in fact, he was unconscious; he could not talk to me; and I looked around to the truck driver and he had got out of his truck and was standing at the curb line in front of his truck, and I called him, and for a couple of minutes he just stood there looking at me; he must have been dazed or something at the time, and a man came running out and said, "Leave him in the car; I just called the ambulance." I could not get my father out by myself, and at the time he was trying to gasp for breath, and he was just beginning to come to.

By that time a couple of minutes had passed, and the State Police car came up, and they had a stretcher in the car, and this here state cop came over, and the truck driver, and I just could not say who else was there to help. By
128 that time several people had come around, and they took my father and put him in the State Trooper's car, and I asked him where he was going to take him, and he said to the doctor.

Q. Going back to the time when the truck driver was standing near his car, when you got out, how far was the truck from your car at that time? A. There was a distance of from here to where you are standing, to where I am sitting. That is where the truck was.

Q. Where was your car? A. Our car at that time was practically—in fact, it was laying just half way over the white line on both sides. It was right in the center of the road.

Q. Where was the front end of your car? A. The front end of our car was over on the extreme right of the road, and the back end was on the left hand side of the road, because the wheel of the car on the back had caved in.

Q. Did you notice any damage done to the truck at that time? A. Yes. As far as I can remember, his headlight was smashed in.

Q. Which headlight? A. His left front headlight, and his grille on the radiator had been smashed in, and the left front fender.

Q. Was there any damage on the right-hand side
129 of the front end of his car? A. None at all that I can recall.

Q. How about the bumper of his car? A. It did not appear to be bent to me, because there was a heavy channel arm—

Q. You spoke about some rails on the car. A. The two rails which were sticking out over the front of the cab-like.

Q. Over the front of the front end of the cab? A. That is right.

Q. How long was that car, that truck? About how long was it? A. With the trailer?

Q. The length of it? A. The complete length of the truck and trailer?

Q. That is right. A. I would say about 50 feet; 50 to 55 foot long.

Q. How long was your car, if you know? A. My car was about 10 foot long.

Q. Did they take your father to the hospital? A. The State Trooper told me he was taking my father to the doctor, and I wanted to go with him, and he told me to stay there and he would be back for me, and he said, "In the meantime, try to get your car off the road."

Q. Did you take your car off the road? A. Yes,
130 sir, I did.

Q. Then what did you do? A. Then I stayed there until the State Trooper came back. He came back for me in twenty or twenty-five minutes, I suppose, and he took me to the doctor's office.

Q. When you got to the doctor's office, did you see your father? A. When I got to the doctor's office, my father was laying in the doctor's room there, on a stretcher.

Q. Did you observe whether or not he was suffering then? A. Yes, he was, because he asked me when I come in to help him, to set him up, if I could, so that he could get his breath, and he was complaining of pains and aches. He said every time he tried to move, it would hurt him.

Q. Did he indicate any portion of his body that was hurt? A. Yes, he was holding his sides and he said his leg was hurting, and his head and all hurt him and he could hardly turn over either way, and the only way he would seem to get any comfort was when I would hold him up.

Q. Did he appear to be experiencing any difficulty with his right leg? A. Both of his legs, and both were twisted out—the muscles twisted in them, or something.

Q. Did he walk at any time, to your observation,
131 then? A. No, he could not stand up or sit up at the time.

Q. You observed the doctor examining him? A. No.

Q. Did there come a time when he left the doctor's office? When your father was carried away from the doctor's office, were you there? A. That is right.

Q. State whether or not you accompanied him when he left. A. Yes, I did.

Q. How did he go, if you know? A. At the time, there was a couple of fellows from the gas station or some place, and the State Trooper and them picked him up on the stretcher and carried him out into the State Trooper's car again.

Q. Carried him on the stretcher? A. Yes, sir.

Q. Did you go along then? A. Yes.

Q. Where did you go then? A. From there the State Trooper took us through the town and stopped in front of a building and said for us to wait in the car just a minute, and he went in this building and brought out a man—I am not sure whether he was a magistrate or a justice of the peace. He told us—

132 Q. Who? A. The State Trooper—that we would have to see this man before we could be released.

Q. Was the truck driver there then? A. And the truck driver was there, yes, sir.

Q. He was present? A. That is right.

Q. What if anything occurred then? A. Then this man came out. He said to my father he would like to help him as much as he could, and said there was no way of having a hearing, for him to bring him in the court house in the condition in which he was, but he told him—he says, due to this accident, if he would plead guilty to a reckless driving charge, he could impose a fine upon him and leave him go, and I asked him how much the fine would be, and he told me it was \$1.75.

So I told my father to go ahead and pay it, and I said then we can go back in to Washington, because we had not known anybody in that town.

Q. How much money did you have with you? A. At the time I did not have any money, but I took some money from my father's pocket and paid that.

Q. Do you know how much you had altogether? A. When we left, altogether we only had seven dollars.

Q. Did you pay the doctor anything? A. Yes.

133 Q. How much? A. I am not certain whether one dollar or two dollars. I received a receipt from him, but I lost the receipt.

Q. Did you pay the \$1.75? A. Yes, sir.

Q. Were you allowed to go? A. Then the State Trooper took us back to our car again and told us we could go on to Washington.

Q. Was there any testimony taken there of any kind at that time as to how this accident happened? A. Nothing that I can remember.

Q. Was your father told anything about whether or not the truck driver was charged? A. No, he was not.

Q. Did your father, to your knowledge, sign any other paper at that time? A. No, sir.

Q. Did he sign any other paper in your presence at any time? A. Not the time I was with him.

Q. State whether or not your father was suffering at the time he was in front of this place where the justice of the peace and the trooper came out to the car. A. Yes, he was, because he had been moaning every time the car

134 would make a little bump or something; he would moan or tell me it hurt him, and when I asked him if he had any money, he said there was some money in his back pocket, to get it out. He could not reach it.

Q. Did you observe whether he had any cuts or lacerations on his person? A. Yes, I believe his ear had been cut.

Q. Which ear? A. His left ear, and he had a pair of glasses on, and they were broken, and he had received a couple of little scratches around on his face from them, I suppose—it was either from the glasses or from the flying glass.

Q. Any cuts on his hands? A. Yes.

Q. Did you go back to the car? A. When we left there, the State Trooper took us right back to our car, and the State Trooper and the truck driver helped to get my father back into our coupe, and then they left us there at that place.

Q. I show you three photographs marked Plaintiff's 1, 1-A and 1-B, and ask you if you will examine those and state whether or not they represent the condition of the car at the time of the accident. A. At the time this picture was taken I was not present, but that is the condition of the car, the condition I had to put it in to drive it as far
135 as I did, and to tow it to Washington.

Q. Looking at the left rear wheel, was that wheel the one on the car at the time? A. No, sir, that is the spare wheel. The other wheel was bent completely in half.

Q. How about the fender and running board and other damage on the left side? A. That is the same as it has been, and the top had been crushed down and I pushed it up and put a stick there to hold it in place, and there is some rope on the door handles; I could not keep the doors shut, and there was no glass in the doors, and all underneath the car, the whole transmission had been cracked in half.

Q. Will you state whether or not you drove your father into Washington after you started your car? A. No, I could not drive the car that far. I put another wheel on there—it is on there in that picture—and I repaired the flat on the right-hand side, and after I got the car so it would run, I drove it and tried to come to Washington, and the car broke down altogether on me in the road, and we

sat on the side of the road until my aunts came and picked us up.

Q. Do you know where it was your car broke down? A. I don't know whether we would call it the Baltimore Pike.

Q. Had you gone through Baltimore yet? A. Yes, 136 sir.

Q. And were you going toward Washington? A. That is right.

Q. Was it on a sharp turn? A. It had been on a place that was referred to me by my father as Dead Man's Curve, and there had been quite a few accidents on that curve, and I guess that is the reason they called it that.

Q. Did you make any telephone calls at that time? A. Yes, sir.

Q. As a result thereof, did anyone come to where you were on the road? A. Yes, sir.

Q. Who came? A. My two aunts from Washington.

Q. Mrs. Munson and Mrs. Allen? A. That is right.

Q. How did they come out? In an automobile? A. Yes, sir.

Q. What did they do then? A. After they found us, they drove over to the side of the car, and by the time they had got there, we had sat on the side of the road for several hours and my father was quite in a delirious mood all during that time, and several times he had coughing spells and spit blood.

137 Q. Did you see that yourself? A. Yes, sir, and he fainted, and he had been talking to me like he never talked before.

Q. Don't repeat what he said. A. When my aunts got there, he did not recognize them and did not want them to take him away. He said, "Leave me alone."

Q. Don't repeat what conversations occurred.

The Court: I do not see, gentlemen, if what he said would indicate a delirious condition, an unconscious condition, why it would not be admissible—not for the purpose of proving any substantive fact, but simply for the purpose of proving his condition.

By Mr. Offutt:

Q. Proceed. What did you say he said? A. At the time he told them to leave him alone, don't touch me, and he did not even recognize who they were at first, and so I told

him it had been my aunts and they had come to take him to Washington, and then we could hardly move him, because every time we tried to move him around, he complained it hurt him so, and we had to take it easy until we finally got him into my aunt's car, and then when we got him into my aunt's car, we could hardly drive fast, because he kept complaining every time the car would bounce or something and he wanted to stop, that it would hurt him too much.

138 Q. What happened to his automobile? A. My aunt put a chain around the bumper of it and towed it to a garage above there. The garage was at Laurel. I believe that was the name of the place. We left the car alone there in a garage, and drove my father to a hospital in Washington.

Q. Do you know what hospital it was? A. Yes, sir, Freedmen's Hospital.

Q. Did you go with him into the hospital? A. Yes.

Q. Did you see anything that they did for him there? A. No.

Q. Did there come a time when you left the hospital? A. Yes, sir.

Q. Where did you go? Did you go with him? A. Yes, sir.

Q. While you were in the hospital, were you around him at all? A. I was just in the waiting room. I could not go in with him, and they put him in a wheel chair and wheeled him out to the car, and several orderlies put him into the back seat of the car again, and from there we went to my aunts' house at 123 R, Northeast, and when we got there then we had to have a couple of the neighbors and myself and I just can't think who else was around somewhere help us bring him into the house, and they had to bring a

139 chair out of the house and put him in the chair and pick the chair up and bring him in the house in that.

Q. Any pain then? A. Yes, he was in pain all the time.

Q. Did you observe him after he got into the house? A. Yes, I was with him all the time.

Q. How did he spend that night, if you know? A. All during that whole night, I know he did not sleep.

Q. Did you see him at various times during that night? A. Yes, sir. I had been up half the night myself and all

that day, and I felt miserable several times during the night, but he did not seem to go asleep, and he had several pains.

Q. Were you in the same room with him? A. Yes, sir.

Q. Do you know when he returned to Philadelphia? A. Yes, sir. My brother-in-law and sister and mother had been notified of the accident, and came down that following morning of the accident, and they took him home in their car.

Q. He was not your brother-in-law then, was he? A. No, he was not.

Q. Did you go home with him? A. Yes, sir.

Q. When he got home, do you know where he went
140 —your father? A. We took him right into the house at the time, and we carried him in and we could not take him upstairs because we could not get him up the steps, so we had to put him in a chair in the living room, and he stayed in that chair for a couple of days before he could be moved.

Q. What sort of a chair? A. A big easy chair we had in the living room, belonging to a parlour set.

Q. Do you know whether he had a doctor or not? A. Yes, sir.

Q. Do you know what doctor it was? A. Dr. Moleski, of 2626 East Allegheny Avenue, Philadelphia, that was our family doctor at the time.

Q. State how long your father stayed home after this accident. A. You mean, until he was able to walk, or to go out?

Q. Yes, until he was able to walk. A. He had not been able to walk from the time of the accident—that was October 17—until, it was, just a few days before the Christmas Holidays that he was able to get out of bed and with the help of me and my mother and go back and forth to the bathroom, and it was after New Years before he could even manage to get up by himself with a cane.

Q. Do you know how long it was before he was able to get outside of the house? A. It was sometime around
141 late in January, I believe it was, when he used to go out, but never by himself, always with my mother, until he became strong enough to walk around by himself,

and at the time he used to feel he wanted to go for a walk, and he would start out and maybe only go a few steps and come back.

Q. Would you see him on those occasions? A. Several times I did, but most times I was working.

Q. Just describe what you know. A. As far as I know, every time I would come home he would be back in bed again. I always used to go up and talk with him, and he would tell me how far he would walk each time.

Mr. Quinn: I object.

The Court: Objection sustained.

By Mr. Offutt:

Q. Mr. Traynor, from the time of this accident when your father got home in Philadelphia until up to the Christmas Holidays when he first got out of bed, did you observe your father's condition, and whether or not he suffered?

A. Yes, I would say he did, very much.

Q. Can you describe his suffering as you observed it? A. He always had complained—

Mr. Quinn: Just a moment.

The Court: Do you mean you object?

Mr. Quinn: I object to his stating what his father
142 told him.

The Court: Do you object to his saying that his father complained?

Mr. Quinn: Oh, yes.

The Court: I will overrule that objection.

The Witness: Of course, at nighttime was the only time I got a chance to see him. I worked there eight hours a day.

By Mr. Offutt:

Q. When he made these complaints you spoke about, did you observe or did he indicate any ailment that he had?

The Court: How did he act, different from the way he acted before he was hurt?

Mr. Offutt: That is it.

The Witness: In comparison, when he was hurt I could not hardly talk to him; in fact, I mean that he was always

complaining, every time he would try to move, that something hurt him, and he was always moaning, and of course after he had been brought home he had got some rest; he was in a fit condition so that you could talk to him, but it got his nerves, and when I would talk to him in the evening, he would tell me of different parts of his body hurting him; he would always complain of his sides and back. He said he always had sharp pains between his shoulders and neck, and he would hold his legs and rub them and say he could not seem to get the cramps out of them.

Q. Before this accident, did he have any complaints of that kind, or ailments of that kind? A. I never knew of my father to be sick before the accident. He was always a healthy man.

Q. Do you know where your father worked prior to this accident? A. Yes, sir, the same place I am employed now, in the Allen Iron & Steel Company, Philadelphia.

Q. What kind of work did he do there? A. As a riveter.

Q. Did you observe him as he did his work? A. Yes, sir, I worked in the same crew with him. I was heating rivets for him at that time.

Q. Was he able to do his work all right? A. Very well. Mr. Offutt: That is all.

Cross Examination

By Mr. Quinn:

Q. You were going up Conowingo Road and were going to turn into Broadway? Just stand off to the side, so that the jury can see you, and show us where your car was. Just draw a block for your car, and where it was at the time you saw the truck.

Do you want a line in the center of the road? A. Yes, sir.

Q. You say that there was a white line, and that it continued around the curve? A. Yes, sir.

Q. You are quite sure of that, are you? A. Yes.

Q. Tell us where your car was. Put a square—show us how far it had gotten around the curve when you first saw the truck.

(The witness did as requested.)

Q. That is your car when you first saw the truck? Is that correct? A. It was approximately in that position.

Q. How far do you think you were from the white line, the center line of the road at that time? A. I could not very well tell you. I know we were on the right side of it.

Q. Are you sure you were on the right side? A. Yes, sir.

Q. Where was the truck? Put the truck where it was when you were in this position here (indicating). Where was the truck? A. This (indicating) is the position of our car before the collision.

Q. Yes, and when you first saw the truck.

(Witness designated the position of the truck.)

Q. Then the truck was on its right side of the
145 road, was it, when you first saw it? A. Yes, sir.

Q. And was that the time the truck was about from the witness chair to the first pew here, as you called it, from— A. Yes, sir; that is the first time I observed it.

Q. Your car continued to make the turn then? A. Yes, sir.

Q. Just show us the way it turned—don't rub that one out; leave that there and put another one; put some dots showing the way you traveled, and the way the truck traveled.

(The witness did as requested.)

Q. That is the way you were going? A. Yes, where we intended to go.

Q. How far did you go before the truck hit you? A. About this far (indicating).

Q. And you came up to that point there (indicating)? A. Yes, sir.

Q. And the truck—put a dot to show how the truck traveled, whether it came over that white line or not. A. This (indicating) would be the front of the truck, in my estimation, right there (indicating).

Q. Did the truck come over the white line? A. Yes, sir.

Q. You are quite sure of that, are you? A. I would say he did, because I was this side of the white line when
146 we got hit.

Q. You say you were on the right side of the white line. How about your car? A. My car was, yes, sir.

Q. After the collision occurred, you said that your car was straddling the center of the road; that is, the front part of your car was over on the truck's side of the road, and the rear of your car was on your side of the road?

A. The front part of our car was on the right-hand side of the road.

Q. Your right-hand side? A. The side I was straddling, yes.

Q. After the collision was over, the rear of your car was still over on your side of the road? A. No, the rear of our car was out over this white line.

Q. The rear was over on the truck's side? A. Yes, sir.

Q. And the front was on your own side? A. Yes, sir.

Q. Was it just across the road—which way was your car pointed, toward this side (indicating) of Broadway?

A. It was pointing toward Broadway.

Q. Which way was the front of your car pointing? Toward this side (indicating) of Broadway? A. This (indicating) is Broadway?

147 Q. Yes. You were going to turn into Broadway, or you had turned into it? A. Yes, sir.

Q. Just show us the position your car was in across that white line. You can use this end up here, so that we can get an idea of the way the car was pointed across that white line.

(The witness made a drawing on the blackboard.)

Q. After the accident was over, which way was it?

(The witness indicated on the blackboard.)

Q. Is this your car here (indicating)? A. Yes, sir.

Q. Pointed in this way (indicating)? A. That is right.

Q. Is this (indicating) the front of your car? A. Yes, sir.

Q. And this (indicating) is the rear? A. That is the back.

Q. Was it just the left rear wheel that was over the center line? A. That is all that passed the center line, yes, sir.

Q. Was the front against the curb? A. Not quite. The car was not that long.

Q. It would not be that far over, would it? A. No.

148 Q. Do you think the left rear wheel of your car was about all that was over the white line, on the wrong side of the road? A. After I got out of the car and looked at it, yes, sir.

Q. When you got out of the car, where was the truck? A. The truck was backed up along the curb here, when I got out of the car.

Q. And did your car remain in the position—that part of it over the center of the road? A. Yes, sir.

Q. You said something about, as you came to, you felt sort of a bump, as if the car had been let down, and the truck was then being backed into the curb over on its right-hand side of the road—is that correct? A. Yes, sir.

Q. Did you feel your car moving at all, outside of your saying you felt something, a bump or something? A. That I could not tell because of my dazed condition.

Q. Was the truck into the curb when you got out of your car, on its own right side of the road? A. Yes, sir.

Q. It had completed its backing? A. Yes, sir.

Q. Did you see it back? A. Yes, sir.

149 Q. When you said you came to, did you see it backing or did you see it over there and assumed it had backed? A. No, I saw the truck backing, because the driver had just turned the wheels and the front of the truck just went in to the curb.

Q. That is when you just came to, that you saw that? A. Yes, sir.

Q. What damage was done to the truck? A. The radiator grille had been smashed in. The left front headlight and the left front fender of the truck.

Q. Don't you know that the entire front of the truck, the radiator grille and the shell had been pushed back on the motor? Isn't that the fact? A. It had been pushed—

Q. In other words, crushed in and pushed straight back? A. No, I did not examine that that thoroughly.

Q. But all the front of the truck was mashed in—don't you know that much about it? A. It did not appear to be any other damage to the truck than—

Q. Than to the radiator shell? Was that mashed in?
A. Yes, sir.

Q. All across the front? A. Just on the left side. The
right-hand side of the truck had not been touched.
150 Q. I want to call your attention to this circle
right here and part of a circle right here on that
picture of your car, and ask you if those are not the head-
lights of the truck—the imprint of the headlights of the
truck? A. This is no circle, but a piece of rope hanging
on the side of the car at the time.

Q. What is the piece of rope? A. Right here (indicat-
ing).

Q. Right in here, where it is bent in?

Mr. Offutt: I think the jury ought to see what he has.

Mr. Quinn: I will show them.

Here is what I am calling your attention to. Do you see
this circle here (indicating), and do you see this dented
part here that comes around, smeared a little?

The Witness: If you will notice, that is a shadow in there.
When the picture was taken, the sun was shining bright.

By Mr. Quinn:

Q. What about this circle (indicating)? Do you think
that that is an impression on the headlight lens? A. Yes,
sir.

Mr. Offutt: In fairness to this witness, let us have what
he answered when Mr. Quinn asked him about that one on
the right.

Mr. Quinn: The jury saw that.

Mr. Offutt: No, they did not.

151 Mr. Quinn: I don't stand that without protest. I
say that there is not the slightest foundation for him
to say that I held that in like that (indicating) to the jury;
and the jury knows it.

Mr. Offutt: Before he went around to the jury—

The Court: I will tell you what I suggest, that you let
Mr. Quinn complete his cross-examination.

Mr. Offutt: Very well.

By Mr. Quinn:

Q. Young man, you knew what I was pointing to, didn't you, when I asked you to stand around like this? A. Yes, sir; you asked me if that looked like the impression on the headlight lens.

Q. And it does look like it? A. Yes.

Q. Is it not a fact that this car of yours skidded?

The Court: It is about adjourning time. If you will take much longer, the Court will adjourn until tomorrow morning at 10 o'clock.

Mr. Quinn: We have some witnesses out there from Bel Air and Baltimore, a state officer and the justice of the peace, and a young man from Alexandria. Will the marshal be sure to tell them to be back?

The Court: Yes.

Your examination has not been completed.

152 Mr. Quinn: I have quite a bit.

The Court (to the witness): You have been sworn, and your testimony is not complete. You are not allowed to talk to anybody about this case, to your father or your counsel or anybody else between now and 10 o'clock tomorrow morning.

(Thereupon, at 3:45 o'clock p.m., an adjournment was taken until Tuesday morning, October 24, 1939, at 10 o'clock.)

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Washington, D. C.

Tuesday, October 24, 1939.

Hearing in the above-entitled cause was resumed before Mr. Justice Goldsborough and a jury at 10 o'clock a.m.

Appearances:

D. K. Offutt, Esq., and

E. N. Fonbuena, Esq., for the plaintiff.

Henry I. Quinn, Esq., and

Richard W. Galiher, Esq., for the defendant.

Proceedings

The Court: Gentlemen of the jury, you will be excused for just a very few minutes. Retire to the jury room, please.

(After the jury had retired:)

The Court: Now, Mr. Offutt, what have you been able to make up your mind about those cards and the other
154 papers?

Mr. Offutt: Your Honor, I understood your Honor to say that you were about to admit the cards, that you had made up your mind on that.

The Court: But you said that the cards and the other papers did not appear to entirely correspond, and of course if they don't, if there is any question about that, I cannot admit any of it.

Mr. Offutt: I have checked them over carefully, and the only purpose that I want to introduce these cards for is to show the number of visits which the doctor made, and the treatment.

The Court: Do the cards and the papers correspond?

Mr. Offutt: The cards and the papers do not correspond entirely in this respect, that the papers have a lot of dates on them which the cards do not have.

The Court: Did the papers include all the dates that the cards have?

Mr. Offutt: Yes, the papers included all of the dates which the cards have.

The Court: But the cards do not contain all of the dates which the papers have?

Mr. Offutt: That is correct.

The Court: The Court is ready to rule. I think sometimes that you have to make a practical sort of a
155 ruling. The Court thinks, in order that the jury may not have the opportunity of reading those papers, that the jury should be told of the amount of the bill, the number of visits, and the length of time during which the visits were made. If counsel can agree on that, that will dispose of the matter. Otherwise the Court will have to allow the jury to have the papers, and to be instructed that they are to disregard everything except the amount of the

bill, the number of visits, and the time through which the visits extended.

I do not want the jury to have the papers if it can be avoided, because there are other matters on the papers besides the amount of the bill and the number of visits.

I don't know whether you gentlemen can agree on that or not.

Mr. Quinn: If I get a further chance to examine those papers, I may agree to enough to satisfy Mr. Offutt. I took a hurried glance at them yesterday.

The Court: Can't we let the jury come in, and go on with the case?

Mr. Quinn: Yes. We can look at them at lunchtime.

Mr. Offutt: Mr. Quinn, I have a copy here, recapitulated of everything that was signed by the doctor, which I previously showed you.

The Court: You can loan that to Mr. Quinn. Maybe it will help him.

156 Mr. Quinn: It may enable us to translate some of that stuff.

(At this point the jury returned to the jury box.)

The Court: Now, gentlemen, if you will proceed.

Thereupon **William F. Traynor, Jr.**, the witness on the stand at the time of the taking of an adjournment on the previous evening, resumed the stand for

Further Cross Examination

By Mr. Quinn:

Q. Mr. Traynor, after you and your father left the place in front of the justice of the peace's office, you went back to the scene of the accident, did you not? A. Yes, sir.

Q. Did Mr. Emmert, the driver of the Nu Car Carrier truck, go back there with you, with the officer? A. Yes, sir.

Q. Did your father at that time sign a paper for Mr. Emmert? A. No, sir.

Q. What? A. No, sir.

Q. Were you with your father all of the time after the accident? A. Yes, sir.

157 Q. And you were at his side at the doctor's office and at the justice of the peace's, and also on the way from those places back to the scene of the accident? A. Yes, sir.

Q. And you were right alongside of him and helped to put him in the car? A. Yes, sir.

Q. I ask you if young Emmert, the driver of the truck, did not present to your father a paper—this is not the original of it.

Mr. Offutt: I object to it, then.

Mr. Quinn: We will account for the absence of the original.

The Court: Let him look at it and see.

The Witness: That is the first time I ever saw a paper like that.

By Mr. Quinn:

Q. You did not see Mr. Emmert present any paper, or card, or anything for your father to sign? A. No, sir.

Q. And your father did not sign anything? A. No, sir, not while I was with him he did not sign anything.

The Court: Mr. Quinn has asked you, as I understand it, whether or not you were with your father all of the time—haven't you?

158 Mr. Quinn: Yes, your Honor.

The Court: And you stated that you were with your father all of the time. Is that right?

The Witness: All with the exception of the time that the State Trooper took him to the doctor's, and there was a time of about 20 or 25 minutes before he came back and took me to the doctor's.

By Mr. Quinn:

Q. After you went to the doctor's office you found your father there? A. Yes, sir.

Q. And from that time on over to the justice of the peace and from there to the scene of the accident and at the scene of the accident you were at your father's side all the time? A. Yes, sir.

Q. And he did not sign any paper? A. No, sir.

Q. And Mr. Emmert did not hand any paper to him to sign? A. No, sir.

Mr. Offutt: That is not what the witness said. Mr. Quinn changed his answer around. The witness said he did not see him sign a paper.

The Court: Yes, he said he did not see him sign the paper, but he was with him all the time.

159 May I see that paper?

Mr. Quinn: Yes, your Honor.

Mr. Offutt: I would like to see it, too.

Mr. Quinn: Will you mark that for identification, the paper I showed him?

(Copy of paper stated to have been signed by plaintiff and given to defendant's driver at time of accident, marked Defendant's A for identification.)

By Mr. Quinn:

Q. Mr. Traynor, at the justice of the peace's, in front of the justice of the peace's office, you said that the justice of the peace came out to the car.

The Court: Excuse me, Mr. Quinn; if you desire to bind this witness in any way, the Court thinks that at the same time you should show him the original paper.

Mr. Quinn: I am going to account for the absence of the original. We will show that there was an original, and who it was sent to, and how it disappeared.

The Court: The witness says that he did not see a paper of that kind. I do not know anything about the other paper. This paper is typewritten, of course, and it seems to me that if an attempt is going to be made to indicate that his testimony is not accurate in so far as this paper is concerned, that he should see the original paper. If that cannot be done, I do not think that his testimony ought to be seriously questioned.

160 Mr. Quinn: Just on the question of the fact that his father did not sign a paper.

The Court: Did not sign any paper?

Mr. Quinn: Did not sign any paper, as he may not have read the contents; I won't try to impeach him on that at all, just the fact of signing.

Q. Mr. Traynor, when you got back in front of the office of the justice of the peace, and the justice of the peace came out, just what did the justice of the peace say? A. I don't remember his words just exactly, what he said to my father, but I can explain as much as I do remember to you.

When he came out he told my father that due to the fact that he had this accident, that there would be only one way he could help him out, and he said that if he would be willing to plead guilty to a reckless driving charge, and he said if he would, then he would have to impose a fine upon him, and at the time I knew that we did not have very much money with us, and I was so anxious to get him to Washington, and I asked him how much the fine would be, and he said it would be \$1.75, and I thought it was a reasonable enough fine that we should pay that to be able to continue to Washington where I could get him further help, to get my father a doctor.

Q. You had been to a doctor at Bel Air, hadn't
161 you, Dr. Davis? A. That is right.

Q. And did not Dr. Davis say that there was not anything seriously wrong with your father? A. Yes, but I was not satisfied with that.

Q. He did say that?

Mr. Offutt: Let him finish.

The Court: I would give him ample time. The witness, as far as I can tell, has probably never been in a court room before.

The Witness: I had not been satisfied with the doctor's examination, because I could see my own self that my father was not acting as he should, and he was very much suffering with pain.

By Mr. Quinn:

Q. But the doctor did say that he was all right, that there was nothing seriously wrong? A. Yes, at that time the doctor told me he was.

Q. Then you went from the doctor's office to the justice of the peace. Is that all that the justice of the peace said to you, as you have related it here? A. Yes, sir, that is all that I can remember.

Q. Did he say anything to Emmert, as to what would happen to Emmert, the driver of the truck? A. No, I did not hear him mention a thing to Emmert.

Q. Did he tell Emmert to plead guilty? A. I could
162 not tell you if he did. I did not hear him say anything to the driver at all.

Q. You and Emmert and your father and the policeman and the justice of the peace were all there together?

A. The State Trooper and the truck driver and the justice of the peace were standing outside of the car, and my father and I were seated in the car.

Q. Did he say anything about having a trial or coming into his court room? A. No, sir.

Q. He did not?

What did your father say when the justice of the peace said what you have just related? A. After I asked the justice of the peace how much the fine would be, and I told my father, I said it would be best if we would pay it that way in order to be released and get to Washington, where I could get him to a hospital.

Q. What did your father say to that? A. I asked my father if he had any money, and he told me he had money in his back pocket and I should get it out for him, and I got the money out and paid the justice of the peace.

Q. Did he tell you where the money was? A. Yes, sir.

Q. And the money was where he told you it was? A. Yes, sir.

163 Q. Then did your father or you tell the justice of the peace how the accident happened? A. I cannot remember that I did.

Q. Don't you remember that your father told the justice of the peace that the road was wet and he skidded over on the left side of the road, and that if the road had not been wet he could have made the turn in safety? A. No, sir.

Q. Did he say anything like that? A. No, sir.

Q. Did you say anything like that? A. No, sir.

Q. Is it not a fact that that is what happened, that you did skid over on the wrong side of the road? A. No, sir, it is not.

Q. Will you show us, taking these two cars, toy cars, and illustrate—just show the jury how the truck came into collision with your car? Here is your coupe, this green one, and this orange one is the truck. I think you said that as you turned that corner over there, in the position you have it, at an angle, that the truck was coming in this way toward you—is that correct? A. Yes, sir.

Q. Now, just take the cars and show the jury just the way the truck traveled into your car, and what your
164 car did just before it was hit, whether it turned this way or just what it did.

The Court: I would suggest that he do it up here. If you will stand up, son—here is Conowingo Road, and here is Broadway (indicating).

Gentlemen of the jury, can you see what we are doing?

By Mr. Quinn:

Q. This (indicating) is Conowingo Road, and you were coming up here—

Mr. Offutt: Let the witness show.

Mr. Quinn: I was just showing the witness—

The Court: I think that we had better let the witness handle it.

Mr. Quinn: This (indicating) is the truck. Just show us what happened. Just take your car and move it—

Mr. Offutt: Let the witness—

Mr. Quinn (continuing):—as if you were coming off Conowingo Road, to make that turn.

(The witness did as indicated, and added:)

The Witness: As we approached the intersection, we got to the peak of the turn, that truck had been coming in, just as I am moving it.

The Court: Make that white line, because I think it is probably necessary. I am not an expert draftsman, but I want you to understand that.

165 Mr. Quinn: We won't question that.

Mr. Offutt: Let the witness draw it the way he thinks it should be.

(The Court was drawing something on a diagram.)

Mr. Quinn: His Honor will draw it.

Mr. Offutt: I want the Court to draw it, not Mr. Quinn.

The Court (to the witness): You put the line there yourself.

The Witness: All right, sir.

Supposing we represent your line like this (indicating) and this will be, in other words, the right-hand side of the road where the truck driver is.

By Mr Quinn:

Q. Is that (indicating) the curve? A. That is right. That will give you a better illustration.

This is my car here (indicating), and this is the Nu Car Carrier Company's truck. Now, we were going toward Baltimore on the Condowingo Road, and as we came to this curve, our car turned, and as we got to this turn here (indicating), this truck was coming about the white line, and as we approached the curve further, the truck had been over the white line, and just as the two cars begin to pass each other, the truck had cut in very sharply and caught us right on the door of the car, on the driver's side, and that is where the crash occurred, and I don't
166 remember any more.

Q. This is about the position, as you have them, of the way the cars came together? A. Yes, sir.

Q. Had you straightened out your car at all, or was your car just the way you have it when the collision occurred? A. The cars were in that position.

Q. Just in that position? A. He had not touched our front; struck us right at the door, like that (indicating).

Q. Did it strike it where you have it, just about half way on the running board? A. No, sir, right at the front of the running board.

Q. You have it a little bit further up. That is about the position, is it? A. Yes, sir.

Q. Then what happened to your car? A. What happened during the crash, I could not tell you, because at the time I was knocked out.

Q. Right before the truck came into you, you had seen it a distance that you estimated from this seat to that front bench there, and it was in motion? A. Yes, sir.

Q. And you were in motion? A. Yes, sir.

167 Q. How fast were you going at that time? A. At that time we were going around 18 to 20 miles an hour.

Q. That is when you were making a turn and when you first saw the truck? A. Yes, sir.

Q. How fast was the truck going? A. I could not tell you the speed of the truck.

Q. Was it going as fast as you were? A. That I could not tell you, because I had not been driving the car and I was not particularly watching the speed of oncoming cars.

Q. Did the truck slow up after you saw it and before the collision? A. There was not that much distance between to tell whether the truck had began to slow up or not. It did not appear to me to be, though.

Q. Did you hear squeaking of brakes? A. No, sir.

Q. When you got out of the automobile after the accident was over, did you notice any tire marks or anything on the road? A. No, sir.

Q. After your cars hit in that position, you say you were knocked out, and then you came to, and just
168 at the time you were coming in, you felt kind of a jar or bump, as if your car was being let down.
A. That is right.

Mr. Offutt: Mr. Quinn, don't move the cars. May the record show the position of the cars?

The Court: If the reporter can look at them. Let him look at them and let him think what would be right, and then let him read it to counsel for both sides.

Mr. Offutt: All right, sir, but I don't know whether the jury can see whether it is over the line or where it is.

The Court: Any member of the jury that cannot see should come up and look.

Mr. Quinn: We will agree that, as shown here, the front of the truck, the way he has it, the center of the radiator would be just over the white line, and the rest to the left side of the front, where the front wheel is, is over the white line on the wrong side of the road, the way he has it, and that the left front wheel of the truck is into the side of the running board just near the front and opposite the door of the coupe.

Is that satisfactory?

Mr. Offutt: And the coupe is entirely over the white line on its side of the road.

Mr. Quinn: Yes, entirely.

Q. Now, then, after you got out of the car, you
169 stated that your car was in the position indicated down there on the lower diagram, with your right rear over the line. Now, will you take these two cars, so

the jury can see, and show just where the truck was and where your car was when you got out of your car after the accident? A. Is it all right to move these cars now?

The Court: Oh, yes.

(The witness did as requested.)

By Mr. Quinn:

Q. The truck is over against its right-hand curb, is it?

A. That is right.

Q. And your car has the left rear wheel and the rear of your car, all with the exception of the right rear fender, over the white line on the wrong side of the road? Is that correct? A. This is not in comparison with what I have drawn on the board. This car moved a little too far.

Q. Put it where it was.

(The witness did as requested.)

Q. You were in that position, then, with the white line running at a line on the inside of your left rear wheel and practically splitting the center of the rear of the car? Is that correct? A. That is right.

Q. Was your left front wheel that close to the center line then? A. No, sir. Our car was facing more toward the curb.

Q. I want it the way it was.

(The witness did as requested.)

Q. Now, you have the right rear wheel just splitting the white line, with the fender sticking over? Is that the position, or is the left rear wheel over the line? A. That (indicating) is the position.

The Court: Just take your time, and do it the best you can; that is all.

As near as you can tell, that was the position of the cars after the accident? Is that right?

The Witness: That is right, sir.

By Mr. Quinn:

Q. Now, was the front of the truck about parallel with the front of your car, as you have it there, after the accident? A. It was just about that distance, yes.

Q. Now, I did not quite understand you yesterday as to whether you saw the truck in motion after the accident. A. Yes, sir, I did see the truck in motion when I looked out of the car. I was still sitting in the car, and I saw the truck driver had just been pulling his wheel and backing. The cab is separated from the trailer on a pivot, and the front wheels of the cab had just pulled in toward the curb. In other words, he had just stopped after he had backed up from the accident.

171 Q. You mean you saw him when he had just stopped? A. Yes, sir.

Q. That is what I understand. But did you see the truck in motion? A. Yes, sir, I saw the truck in motion.

Q. Or did you see him at a standstill at the curb and pulling on his wheel? A. No, sir; his wheels were going backward. His truck was backing up.

Q. Did the trailer part move at all? A. Yes, sir, the whole truck moved.

Q. How far did he move? A. He backed the distance from our car to the opposite curb, and he was about 6 or 8 feet back from this curb line of this street which intersects the curb here (indicating).

Q. Do I understand you to say that you saw the truck after the accident right up against your car, and then you saw it back back? A. No, sir.

Q. Tell us just where it was when you first saw it after the accident, where the truck was. A. Where the truck was? As I opened my eyes, this truck, his trailer was back in here (indicating).

Q. Now you have his trailer back against the curb. A. In order to get back there, he had to back his whole
172 truck up, and the trailer rides on a pivot on the back end of the cab, and these wheels (indicating) were turned in toward the curb and he was backing up and straightening his trailer up.

Q. Put his car where you first saw him.

The Court: He said that when he first saw him, the wheels were turning some.

Mr. Quinn: I want to get the position of the truck, the rear wheels and the front wheels.

Q. Was that the position (indicating), with the rear wheels in close to the curb, and the front wheels out a little bit from the curb? A. His truck was approximately in that position there (indicating) when I first saw him, as though he had just backed away from the car and was continuing backing up and then turning his wheels and bringing the front part of his cab parallel with the—

Q. All right.

Mr. Offutt: Let him finish.

The Court: Parallel with what?

The Witness: Parallel with the curb line.

By Mr. Quinn:

Q. He was about in that position when you first saw him, and he was in motion and backing back? A. Yes.

173 Q. At that time he was on his right side of the road, wasn't he? A. At the time I first opened my eyes.

Q. And just about in the position you have it now.

How long did you say your father was in bed after this accident? A. My father was in bed—he was unable to get out of bed without any help or even with help until several days before the Christmas Holidays.

Q. He could not even be out of bed with help until several days before the Christmas Holidays? A. Yes.

Q. You are very positive of that? A. Yes, sir.

Q. Do you remember when your father next went back to work? A. I don't remember exactly the date, but I know it was sometime late in April that he first went to work.

Q. The month of April; and is it not a fact that your father then worked steadily from the month of April, 1937, until the month of September, 1937? A. No, sir, he did not work that long.

Q. How long do you think he worked? A. He only worked about two and a half months. It may have been about three months.

174 Q. Where did he work? A. He worked for H. A. Budd Company, Philadelphia, Twenty-Fifth and Hunting Park Avenue.

Mr. Quinn: That is all.

The Court: Are you through with the witness?

Mr. Quinn: Yes.

Mr. Offutt: May I ask just one question?

The Court: I beg your pardon. I overlooked that.

Redirect Examination

By Mr. Offutt:

Q. Mr. Traynor, can you see this board from where you are? A. Yes, sir.

Q. Do you know whether this side of the roadway (indicating) had any driveways or roadways in it? A. Yes, sir, there appears to be a private roadway there. I am not sure whether it is private or not. It is only a gravel road, and it is not the width of a two-car lane.

Q. Where is that? Can you mark it on here?

(The witness did as requested, and added:)

A. There is a small roadway runs back in through here (indicating); I believe it runs to a farm and sets back on the left-hand side.

By the Court:

Q. Does the road run up in a bow and then straighten itself out, or does it go right straight up, if you know?
175 A. As clearly as I can remember the road, it runs like this (indicating), and there is some kind of a farm or something that runs into here (indicating).

Q. I was referring to the Conowingo Road, the big bend at the turn and then it keeps straight on; or is it right straight all the way? A. Are you referring to this road (indicating)?

Q. I am referring to the Conowingo Road now, the one you came in on. A. There is an intersecting road here (indicating). I don't know whether that is the finish of the Conowingo Road.

Q. Right at the left, where your finger was, there is a bend? Is there any bend there, or is it straight? A. It is not exactly as sharp as that (indicating).

Q. There is some bend there? A. The road narrows down, and it is more like that (indicating).

By Mr. Offutt:

Q. Now, as you came along here on the Conowingo Road, will you state whether or not there is a grade at that point (indicating)? Is the road level, or is it down hill or up hill? A. Just back from the curve, I would say within a distance of a couple of hundred feet, there is a slight
176 down grade. It is just before you come to the curve you go up and down a slight mound there.

Q. As you come to this part of the road (indicating), is the road level or on a grade? A. The road is on a down grade from this (indicating).

Q. Is it a slight grade, or a sharp grade? A. It is a very slight grade.

Q. Can you give the jury some idea of what kind of a grade it is?

The Court: He could not do that to save his face.

Mr. Offutt: I will withdraw that question.

I think that is all, if your Honor please.

Recross Examination.

Mr. Quinn: Just one question.

Q. Your car was still in motion at the time you were hit, at the time the collision took place? A. Yes, sir.

Q. You were still going about 18 or 20 miles an hour? A. No, I would not say that we were going that fast.

Q. Well, how fast? A. When my father turned the wheel, I know that he applied the brakes. I don't believe we were going exactly 20 miles an hour, because we slowed down in making the curve.

Q. When did your father apply the brakes?

(There was no immediate response.)

177 Q. Was it after you saw the truck? A. I don't remember exactly when he applied the brakes—

Q. Do you remember— A. At the moment—

Mr. Offutt: Let him finish.

The Witness: At the moment the collision seemed unavoidable. At a glance, I noticed my father pulling hard on the right-hand side of the wheel and his feet going on the brakes, and everything just happened in such a quick and confused moment that I could not tell you exactly what did happen.

By Mr. Quinn:

Q. It was right after you saw the truck and just as the collision was about to take place that you saw your father going after the brake? Is that correct? A. I would not state it, because I am not sure. I could not tell you exactly if he had pressure on his brakes or if his foot was only on the pedal.

Q. I did not say that he had gotten the brakes in operation, but he went after the brakes? In other words, he made a motion to indicate he was putting on the brakes, or trying to put them on? A. Yes, sir.

Q. Was that right before the collision took place? A. Yes, sir, it was, because he had just taken his foot off the brakes. He was slowing down only a few seconds
178 before that, before entering the curve, and if I remember correctly, I believe his foot had still been at the brake pedal.

Q. When he was entering the curve? A. That is right.

Q. In other words, as he came toward this curve, you saw he had put on his brakes, as he approached the curve? A. Yes, sir.

Q. Was he at that time going 18 to 20 miles an hour, or was it before he reduced his speed that he was going 18 to 20 miles an hour? A. No, sir; at that time he was going about 18 to 20 miles an hour.

Q. And then he took his foot off the brake just as he got into the curve; but you think he still had his foot toward the pedal? A. Yes, sir.

Q. Then you mean that when he was driving into the curve, he did not have his foot on the accelerator? A. That is right, sir.

Q. Did your father shove out the clutch pedal at the time he put his foot on the brake? A. No, sir. The reason I can tell you that is because he taught me to drive, and he always taught me to leave the clutch—

179 Q. No— A. (continuing) —out until you come to a complete stop.

The Court: All right; proceed. Do not interrupt him. If the answer is not satisfactory, you can move to strike it out.

Mr. Quinn: I object to the answer.

The Court: I know you do, but the answer in my opinion is responsive to your question. You asked that question many times, and the boy is trying to answer you.

Mr. Quinn: My question was about his father shoving out the clutch pedal at the time.

The Court: And he is trying to explain the fact to you, as far as he knows, exactly what his father must have done, because his father taught him to do the same thing.

Mr. Quinn: That is just what I object to.

The Court: I know you do.

Mr. Quinn: It is not what the father must have done.

The Court: I understand that, but I think his answer is responsive, and I will admit it.

Mr. Quinn: Then I move to strike it out.

The Court: Yes, sir.

Mr. Quinn: That is all.

Mr. Offutt: Call Mrs. Munson.

180 Thereupon **Mrs. Marge A. Munson** was produced as a witness on behalf of the plaintiff; and, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

Q. State your full name, Mrs. Munson. A. Mrs. Marge A. Munson.

Q. Where do you live? A. 120 Adams Street, Northwest.

Q. Are you related to the plaintiff in this case, William F. Traynor? A. I am.

Q. What relation are you to him? A. I am his sister.

Q. Where are you employed? A. Freedman's Hospital, Interior Department.

Q. Were you employed at Freedmen's Hospital in 1936? A. I was.

Q. How long have you been employed there? A. Just fifteen years in December.

Q. Now, directing your attention to the month of October, 1936, did you learn of an accident in which your brother had been injured on that occasion? A. I did.

181 Q. Do you remember when it was? A. I was home sick, and they tried to reach me by telephone, and I did not have a telephone in my house, so the switchboard operator at Freedman's located me through a neighbor, about 4:30 or 5 o'clock.

Q. Do you know what date it was? A. October 16.

Q. Was it October 17? A. Yes, it was a Saturday.

Q. What if anything did you do when you learned that your brother had been hurt in this accident? A. We did not know much about it. The message said that our brother had been hurt on the Bladensburg Road, on the State Highway.

Q. Did you have another brother? A. We had another brother at home, a crippled brother. He has since died.

Q. What was his name? A. Charles Traynor.

Q. You said "we"; was there anyone else? A. My sister and I; we lived together.

Q. What is her name? A. Mrs. Eleanor Allen.

Q. Is she out in the witness room? A. She is.

182 Q. Where did you live at that time? A. 123 R Street, Northeast, Washington.

Q. What did you do when you learned that a brother had been injured on the Baltimore Pike? A. We got in our car and we drove down to find him.

Q. Were you told whereabouts on the Baltimore Pike? A. The message said beyond Laurel. They did not know just where, and we had to drive down the road and try to locate him.

Q. Who was in the car when you drove? A. Mrs. Eleanor Allen and I.

Q. State what you did and where you found him, if you did find him. A. We drove down the road looking along for the car, and we found him on the side of the road in a gully just beyond—there was a gas station across the street from where he was.

Q. Do you know what part of the road that was? A. The name of it was just beyond—it was down beyond Laurel.

Q. Between Laurel and Baltimore? A. Between Laurel and Baltimore.

Q. Do you know where the part of the road known as Dead Man's Curve is located? A. Yes.

183 Q. Was it anywhere near that? A. It was this side of Dead Man's Curve.

Q. Did you see your brother there? A. We saw him in the car, and we drove our car over to where he was, across the street and over to him.

Q. Describe what you saw. A. He was laying in the car moaning, and he did not know us, and he was in a terrible condition.

Q. Did you speak to him? A. Yes. We called his name and asked him what happened, and all he did was moan, and he didn't seem to know nothing. He merely said—

Mr. Quinn: I object to what anybody else told this witness, or to what William said. I submit that we are still bound by the rules of evidence.

The Court: I do not know of any reason you have to think otherwise, Mr. Quinn.

Mr. Quinn: I object to the statement of the witness.

Mr. Offutt: Don't repeat what your nephew said.

The Witness: Well, he did not know us at all, so we had the boy to help us try to get him out of the car. So we had to get him by the shoulders, and we, William and my sister and I pulled and dragged him into our car and brought him to Washington, to the hospital.

Q. Did he walk from the car into your automobile? A. No, he could not walk.

184 Q. Was he seated at the driver's seat, or at the other part of the car? A. He was on the other side of the car, on the far side of the car.

Q. Not back of the driver's wheel? A. Not in behind the driver's wheel. His feet were hanging out of the car. We had to drag him and pull him. We could not lift him, as neither my sister or I were able to lift him, and we had to pull him into our car, and could not get him on the seat. He was in no condition to help himself, and did not know nothing.

Q. Could you observe anything about his appearance, any scratches or bruises or cuts of any kind? A. I could not describe any scratches or bruises. All I know is he was so bad off that we lifted him into the car and he moaned and was hurt and in pain.

Q. What did you do with the automobile there? A. They towed the automobile with a chain.

Q. Do you mean the people in your car? A. No, our car—my little nephew put a chain that he had in his car on the front of it, and hooked it to my sister's car, and they towed it up the road, and we got as far as the race track, and it could not go any further, and they ran it into a garage there.

The State Trooper showed him where to push it in.

185 Q. Did you leave the car there? A. Left the wrecked car there.

Q. Was that the race track at Laurel? A. At Laurel, that great big track.

Q. Then what did you do? A. Then we brought my brother, William Traynor, to the Freedmen's Hospital.

Q. Did you go in the hospital? A. Yes, I did. They had to bring out a stretcher to the car to bring him in, and two of the attendants there lifted him out and took him in, and it is not permissible for the family to go into the examining room—

Mr. Quinn: I submit that this has no place—

The Court: There is no objection to that. Proceed.

Mr. Quinn: I do not want to be up all the time.

The Court: You have no occasion to object to anything like that. It is merely an off statement.

Proceed.

The Witness: So they put him on a stretcher, and took him in the examining room, and the two doctors went in, and when they came back I asked them—

By Mr. Offutt:

Q. Don't say what they told you. What did you do? A. They came back to me and told me that he should be in the hospital—

186 Mr. Quinn: I object to that, what somebody told her, and move to strike it out.

The Court: I won't strike that out.

By Mr. Offutt:

Q. Did you leave him in the hospital? A. No, I did not leave him in the hospital, because I tried to tell you the physician told me that he should be in the hospital, but it was a Saturday night—

Mr. Quinn: I still object to that, and move to strike it out.

The Court: The Court overrules the objection.

Proceed.

The Witness: They said he should be in the hospital, but, Saturday nights at Freedmen's hospital, they don't have a vacant bed, and I myself got in touch with the assistant superintendent to see if he could not make him a bed.

He told me to take him home and to get in touch with him Sunday or Monday and he would give me the first bed available, that they had no vacancies then.

The attendants put him back in our car, and we drove to 123 R, and two men helped my sister and I carry him in. There was four steps up and a little run, and we brought him in and put him in a great big chair in the living room and propped his feet up, and I went to the telephone and telephoned his wife and family in Philadelphia, because
187 condition looked like he was dying—

The Court: The Court admits the testimony of the conversation that the witness had with the superintendent of Freedmen's Hospital because it is an explanation from her standpoint of why the plaintiff did not stay in the hospital.

By Mr. Offutt:

Q. Now, proceed. A. So we put his feet up on a chair, with a pillow under him, and the doctor at the hospital had given me white pills and told me to keep him quiet, and, as I explained before, to get in touch with him the next day.

So, when his family came down the next morning—they drove all night—

Q. Who were they? A. Mrs. William Traynor, his wife, his daughter, Minerva Traynor, and her present husband, which was then her boy friend.

Q. What is his name? A. Dominick Biondi.

Q. Are they in the witness room? A. They are in the witness room at present; and, in the condition he was in, they thought it better to take him home, as they had a doctor there. They had no money to pay for a doctor—no money to put him in a bed in the hospital, so his wife took him to Philadelphia, to get his family physician to take care of him.

188 He left my house Sunday between 12 and 1.

Q. During the time that he was in the house, did you observe his condition? A. Yes, I did.

Q. Will you state what manifestations he had of suffering? A. Well, he was in pain, because these little pills we gave him to quiet the pain, and he would moan and moan, and we would ask "Is it more comfortable?" by moving a pillow, and he would say, "I am dying—oh!"

Mr. Quinn: I submit that that is objectionable, and I move to strike it out. This does not account for anything.

The Court: It is difficult for a lay witness to describe a person's condition without to some extent saying what was

said. The Court does not think that the witness has gone beyond the bounds of legal propriety, and I cannot strike the testimony out.

By Mr. Offutt:

Q. Did you administer these pills during the time that your brother was there in your house? A. I did.

Q. Now, how did he go back? In what sort of a conveyance? A. His present son-in-law had a Plymouth car, and he sat, as I told you, on a high-backed chair—it is a
189 semi-invalid chair, and they wheeled it out to the porch. Don and William and two of the neighbors carried that to Don's car, and we placed pillows in the back of the car, and they lifted him up on the seat and wrapped him with a small rug around him, and he moaned and groaned, and I asked them at the time, "Do you think it is wise to take him"—

Mr. Offutt: Don't—

The Court: You need not state what was said. You can state that he moaned and groaned.

The Witness: He did.

The Court: But, the conversation, you leave out.

Mr. Offutt: And don't state what you thought.

The Witness: So they put him in the car and wrapped him up and drove him to Philadelphia, and Don drove slowly—

Q. Did you drive with him? A. No, I did not.

Q. You don't know how he drove? A. No.

Q. When did you next see your brother after he left your house? A. It was the following summer. He came down to see about the car.

Q. You had not seen him in the meantime? A. I had not seen him in the meantime. We had heard from them regularly and I had written and asked his condition,
190 and they said he still was very bad—

Mr. Quinn: I object.

Mr. Offutt: Don't describe what you wrote; but you were in communication with him? A. With the family.

Q. What was your brother's health prior to this time? What was the condition of his health, as you observed it? A. He was always a very healthy, strong man.

Q. State whether or not, to your knowledge, he was able to engage in any gainful occupation. A. Yes, he was an

ironworker, and had been since I remember, always worked as a structural iron worker, climbs up on big buildings.

Q. You had seen him? A. I definitely had seen him on more than one job.

Q. Did you ever know him to be an invalid, as he has been since? A. Never; never knew him to be sick.

Q. When you saw him the following year, when he came to Washington, state what his condition was, as you observed it, as compared to what it was when you saw him before this accident. A. Well, he was a different man entirely. He did not look the same, and he was able to walk and get around, but he did not look like himself and was in no condition; he tired out, and does at the present
191 time. If he does any walking or exertion, he has to lie down or rest.

Q. Have you observed that yourself? A. I have. He has been in my house for a year now, and if he does home chores, we tell him "Don't work this much," because his back and side hurts. He cannot move the furniture.

Q. Was he able to do that sort of thing before this accident? A. Yes.

Q. Was he a strong man? A. He could move a big piano in my room, and now he cannot move the couch. If I catch hold of one side, he cannot lift it around.

Q. Can you tell us what time of the year it was that he came to your house in 1937? A. It was late in the fall or summer or fall.

Q. Can you tell us what month? A. No, I cannot recall the month—July or August; it was late.

Q. How long did he stay at your house on that occasion? A. To the best of my knowledge, I think maybe a week or ten days, definitely.

Q. During the time that Mr. Traynor has been at your house in the last year, will you state whether or not he has been employed in any place, to your knowledge? A. No, he has not. He works doing small jobs around the
192 house, and put in screens on my back porch, and even then he just tapped them in, and then he does housework, straightens up while I am at work and puts out the trash and garbage, but no manual labor.

Q. How is his weight now as compared to before the accident? A. Actual poundage I cannot tell you, but in size he

is much smaller. The pants, I have had to take them in in the back. He has lost weight, definitely.

Q. Was he a muscular man before the accident? A. Yes, a big husky man.

Q. Now, have you had occasion to compare his muscular condition, as to what it was prior to this accident? A. He does not look as big, and, as I say, his clothes don't fit as well.

Q. Has he taken any medicines of any kind, to your knowledge, in the year during which he has been with you? A. We have given him medicine, aspirin and things of that sort, for his pain.

Q. How frequently has that occurred since he has been with you? A. Well, whenever he complains, if we have the aspirin there, we give it to him, or if he has a headache.

Q. Can you give the jury some idea of how often you have done that, if you can recall? A. I could not tell
193 you how many actual times, but I would say a couple of times a week. I have rubbed his side. I have had chloroform, liniment, and alcohol to rub his back with after he complained of pain, and put the hot water bottle to it.

Q. Prior to this accident, have you ever had occasion to do that or have you ever known that to be done? A. No, I had not.

Mr. Offutt: You may examine, Mr. Quinn.

Mr. Quinn: No questions.

Mr. Offutt: Mr. Biondi.

Thereupon **Dominick Biondi** was produced as a witness on behalf of the plaintiff; and, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

Q. Will you state your full name, please? A. Dominick Biondi.

Q. Where do you live, Mr. Biondi? A. 1401 Church Street.

Q. Where is that? What city? A. Philadelphia.

Q. Are you related to the plaintiff in this case, Mr.
194 William F. Traynor, who sits here? A. I did not hear that.

Q. Are you related to him? A. Yes.

Q. You are his brother-in-law? A. Son-in-law.

Q. How long have you known Mr. Traynor? A. A little over five years.

Q. Did you know him before he had this accident in 1936? A. I did.

Q. What was the condition of Mr. Traynor's health, as you observed him, prior to 1936? A. He was in good physical condition.

Q. As compared to what it is now, what would you say? A. There is a lot of difference, I would say.

Q. What is the difference as you see it? A. I know he is not capable of doing his work any more.

Mr. Quinn: I object to that. That is a mere conclusion.

The Court: I will say to the witness that he should not state what he is able to do, because that would only be your opinion. But you can state how his appearance in everything differs from what it was prior to the accident. You can state what you saw yourself.

By Mr. Offutt:

195 Q. Do you understand that, Mr. Biondi? A. Yes.

Q. What did you see prior to this accident—what did you observe in the plaintiff? Describe that, and describe him as you see him now. A. That is pretty hard for me to do.

Q. Did you see him engage in work before this accident? A. I never saw him work.

Q. Did you see him engaged in walking, or anything around the house? A. Walking, I did, yes. I never was on his job or anything, to see him working.

Q. Will you state what his weight is now compared to what it was before this accident? A. I really could not say.

Q. Is he as heavy now as he was then, or is he heavier now? A. He is lighter than he was.

Q. Can you give us some idea of how much lighter you think he is? A. I am not so good at judging weight.

Q. Is he as active now as he was before the accident? A. No.

Q. What did you see him do before the accident that you have not seen him do after the accident, if anything?

196 A. He does not walk as straight as he used to. He used to walk livelier. He had a spurt walk, and now it is different.

Q. Keep your voice up. A. He does not walk as straight as he used to.

Q. You mean that he bends over now? A. Yes, and I notice that when he gets up from a sitting position, he has to bend over a little, and pain.

Q. Directing your attention to the month of October, October 17, 1936, did you learn of an accident in which Mr. Traynor had been injured? A. Yes.

Q. What did you do when you learned that? A. We prepared to come down to him.

Q. Whom? A. Mr. Traynor.

Q. Which Mr. Traynor? A. The father.

Q. I did not understand that. Keep your voice up a little bit.

Did you come down to get him? A. We were told he was in an accident, and we came down. We weren't sure of getting him, or what. We did not know what his condition was.

Q. Did you drive down? A. Yes.

197 Q. Whose car did you come in ? A. My car.

Q. Who drove? A. I did.

Q. Who came with you? A. My wife and my mother-in-law.

Q. Do you remember how long it took you to drive down? A. I would say about four and a half hours.

Q. Did you exceed the speed limit at any time that you can recall in coming down?

The Court: You do not expect him to admit that, do you?

Mr. Offutt: I will withdraw that question, your Honor.

Q. About how long did it take you to drive down? A. I would say about four and a half hours.

Q. When you reached Washington, did you see Mr. Traynor? A. Yes, when I walked in just before 6 o'clock that morning, Sunday morning. It was the 18th.

Q. Will you describe how he appeared to you at that time? Where did you see him? A. He was propped up in a chair, with pillows around him, and he was moaning.

Q. What did you do then? A. I just asked him what happened.

Q. Don't describe what he told you that happened.

198 The Court: You can describe his condition as you saw it, but do not tell what he said. A. He was in pain when I walked in. He was moaning, and I just said,

"What happened, Bill?" I called him Bill, and he just moaned, and I felt that I did not even want to question him.

By Mr. Offutt:

Q. Did you later go back to Philadelphia? A. What is that?

Q. Did you later go back to Philadelphia? A. Yes, in the afternoon.

Q. In the afternoon? A. Yes.

Q. That same day? A. Same day.

Q. During that time from about 6 o'clock in the morning until the afternoon when you returned, did you see Mr. Traynor at any time during that interval? A. Yes, I did.

Q. What was his condition during that time, as you observed it? A. He was still propped up in that chair at the time I saw him, and he was moaning away. I was not with him all morning.

Q. When you returned to Philadelphia, state
199 whether or not you carried him with you in your car.
A. Yes, sir.

Q. How did you get him out in your car? A. We had to carry him out in the chair.

Q. And, as you carried him out in the chair, what did you observe then of his condition? What did you see? A. I saw it was a pretty hard job to get him in the car. I was wondering how we would get him in.

Q. Did you get him in? A. We finally did, yes, after some help.

Q. How did you get him in? A. We carried him out from the house on a chair to the car and alongside of the door, and then we had to lift him in gradually and then work him in a sitting position.

Q. As you carried him out to the car and put him in the car, did he give any indication of suffering any pain? A. Yes, he did.

Q. What was it? A. Well, he moaned.

Q. Did you say moaned? A. Moaning. You know, we did not have him comfortable enough in a sitting position.

Q. You did drive back to Philadelphia with him? A. Yes.

Q. Who were with you on that trip to Philadel-
200 phia? A. Mrs. Traynor, my wife and I, and the son;
that is, the junior.

Q. On your return trip to Philadelphia, how long did it take you to go back? A. We left here around 2 o'clock in the afternoon, and we reached home around just before 11 o'clock, I would say, that evening.

Q. In about nine hours? A. Just about that.

Q. On the trip back, will you describe Mr. Traynor's condition as you saw it then? A. He was in pretty bad shape.

Q. What did you see or hear? Did he sleep all the time? A. Oh, no.

Q. Or did he make any complaints? A. On the road up he was making a lot of complaints about going over the road and things like that.

Q. I mean about his condition. A. About his condition? Well, he was complaining about his pains, and was not sitting right, and like that. I know that I got most told about it, because I was doing the driving—"Take it easy," and this and that.

Q. When you got back to Philadelphia, where did you carry Mr. Traynor? A. Into his house.

201 Q. Where was that? Do you know where it was? A. 3315 Palethorpe Street.

Q. Did you help carry him in the house? A. Yes, I did.

Q. Where did you place him in the house after you got back to Philadelphia? A. We had to bring out a chair and set him in a sitting position in a chair and put him in the house, and we put him in the living room.

Q. Did you visit the house while he was there? A. Yes.

Q. How frequently did you go to the house? A. Well, at the time I was on night work every other night—

Q. Alternating? A. I would alternate, one day night and one day day, and when I was on day work, I would go down four or five times during the week, but when I would be at night work, I would not get down there until the week end.

Q. And do you know how long he was in bed when you would visit the house? A. He was in bed until after the Holidays.

Q. What holidays? A. New Year's, I would say.

Q. Keep your voice up. A. New Year's.

202 Mr. Offutt: That is all. You may examine.

Mr. Quinn: No questions.

Mr. Offutt: Call Mrs. Traynor.

Thereupon **Mrs. William F. Traynor, Sr.**, was produced as a witness on behalf of the plaintiff; and, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

Q. Will you state your full name?

The Court: We will have a five-minute recess.

(After a brief recess:)

Mr. Offutt: May I proceed, your Honor please?

The Court: Yes.

Mr. Offutt: This witness is a little hard of hearing. May I step up a little closer to her?

The Court: Of course.

Mr. Offutt: Keep your voice up, Mrs. Traynor.

Q. State your full name and address. A. Minnie Traynor.

Q. Where did you live at the time of the accident? A. 3315 North Paltorpe Street, Philadelphia.

Q. Where do you live now? A. 1300 Church Street, Philadelphia.

203 Q. Are you the wife of William Traynor, the plaintiff in this case? A. Yes, I am.

Q. How long have you been married? A. Thirty-one years this coming January.

Q. Directing your attention to October 17, 1936, did you learn of your husband being hurt in an automobile accident? A. We got a phone call that night, about between 11 and 12 o'clock that night.

Q. What did you do when you learned through the phone call that your husband had been hurt? A. My daughter says, "Mother, you had better get up." I had already been in bed. She said, "We have to start for Washington."

I said, "What is the matter?"

She said, "Daddy had an accident."

So my son-in-law—he is now—he came with his car and took us down.

Q. I am going to stand here, and see if you cannot hear me from here. And you did drive to Washington then? A. My son-in-law drove my daughter and I down.

Q. That is Mr. Biondi? A. Yes.

204 Q. When you got to Washington, where did you go? A. I went right to my sister-in-law's home.

Q. Did you know where she lived then? A. 123 R Street, Northwest.

Q. Did you see your husband there? A. He was propped up in a chair in the living room, and propped up with pillows. He just about recognized me.

Q. Describe how he looked to you as you saw him propped up in the chair in the living room. A. He was very white and haggard-looking, and he could hardly talk at all. He just said, "I am awfully glad you got here," and he seemed to like pass away. Then I went out into the other room. I did not talk to him for a while. They said, "Leave him rest."

Q. Did you see him when he left in the morning, when he came to Washington? A. Yes.

Q. Recalling how he looked when he left you to come to Washington, and the way you saw him as you looked at him at 123 R Street, tell the jury how he compared, how his appearance compared at that time. A. Well, he was a very husky man, and very active all the years that I have been married to him, and that morning when he left he was in very good condition.

Q. Was he active? A. Yes.

205 Q. Was he a man of good complexion? That is, did he have a good color? A. Yes, he always had a good color.

Q. Was he a ruddy complexioned man? A. Yes.

Q. What time did you get into Washington? Do you recall? A. When we came in?

Q. Yes. A. We came in about 7 o'clock Sunday morning.

Q. Do you know what time you left Washington? A. When we left?

Q. Yes. A. When we took Mr. Traynor back?

Q. Did you take him back? A. That was about 3 o'clock in the afternoon, between 2 and 3.

Q. Did he suffer, as you saw it, on the way back to Philadelphia? A. Oh, we had to stop quite a lot, because it bothered him so to ride. He would lay over on my shoulder, and just seem like to pass away at times. He had medicine that the doctor gave us to give him every now and then.

Q. Did you give him this medicine? A. On the way home.

206 Q. Now, when you got home, he was carried in the house, was he? A. Yes.

Q. When he was carried into the house, did he go to bed immediately? A. No.

Q. What was done with him? A. We had to leave him just sit in a reclining chair in the living room. He sat there propped up, you know, and I had to put a stool there. He rested as comfortably as he could that night and next day and the next night, before he was able to be moved out of the chair, and we put him in another chair and carried him upstairs.

Q. When you carried him upstairs the second day, did you put him to bed? A. Yes.

Q. Why did you leave him downstairs the first two days? A. He could not move. He screamed with pain every time we touched him.

Q. Did you have a doctor to attend him? A. Yes, he came over the first thing in the morning, Dr. Moleski. Q. Dr. Moleski? A. Yes.

Q. Is that Dr. Ignatius Moleski? A. Yes.

207 Q. He has since died? A. Yes, sir.

Q. Now, how frequently did Dr. Moleski come to attend your husband? A. Oh, he came twice the first day and several times during the week, and he came every day and at night I had to call him—I was scared a couple of nights; he brought up blood-like when he coughed, so I called the doctor and he came over.

Q. What other indications of injury did you observe that your husband was suffering from after he got home in Philadelphia? A. Well, his arm and down his leg and his back bothered him a lot and all in through here (indicating), and his head was cut.

Q. For how long a time did he remain in bed? A. Well, he was in bed for about—up until almost the Holidays. He was in bed fast, that he did not get up at all, for several weeks, and then he walked around the room and laid down again, and did not come down until after January.

Q. You mean that he did not come downstairs until after January? A. No, and then he came down like a child would, sat down and came down each step like that.

Q. How do you mean, he came down each step? 208 A. He sat down like a child would and came down step by step, sitting on the steps.

Q. He did not walk down the steps? A. No.

Q. How long a time was it before he was able to get out of the house? A. Well, it was about the middle of January, and I asked him to try to go out with me, and he had a cane

in one hand and I held him with the arm, and we just walked halfway up the block and he could not stand it and we came back, and the next time we would try a little more, until he was able to walk himself.

Q. How long was it before he was able to walk himself?

A. How long?

Q. Yes. A. Oh, February.

Q. Can you give us some idea what time in February?

A. It was almost the latter part of February. I think it was Washington's Birthday.

Q. Now, was he still under the care and attention of the doctor at that time? A. Oh, yes.

Q. Did the doctor come and see him at his house? A. Well, when he was able to get out for a walk, my son took him in the machine to the doctor's office.

209 Q. Would the doctor come to the house at all? A. He came to the house whenever I called him.

Q. Did you call him at that time? A. Oh, I had to call him at night, different times.

Q. That was 1937 that you are speaking about now? A. Yes.

Q. During 1937, did your husband work at any time, to your knowledge? A. Did he work at any time?

Q. Yes. A. Not until the latter part part of May or the first part of May—May, June, and July he worked.

Q. Do you know where he worked? A. He worked for the Budd Company, I think Twenty-Fourth and Hunting Park Avenue.

Q. During the time that he worked, what was his condition when he came home? A. He went right to bed. The first couple of days I had to get the liniment and rub him down, and hot cloths, and he came in several times during the night and he said he would try his best to work, and that is the way he kept on until he felt a little stronger. That was, of course, after not working for some time.

Q. During the three months you said he worked at Budd's, did there come a time during those three months
210 when you did not have to do anything by way of rubbing him? A. Oh, yes, I had to rub him down every night, and sometimes I would have to go in—he would call me in the middle of the night, and I left him have the bed to himself, and I had to turn him on one side, and maybe he would call me and I would turn him on the other.

Q. That was during the time he was working at Budd's?

A. No, that was before, but while he was working at Budd's, sometimes he would call me at night; he had some pain, and asked me to rub him down so that he could get up in the morning and go to work.

Q. When you spoke of turning him from one side to the other, that was during the time before he went to work?

A. Yes.

Q. Immediately following the time when he came back to Philadelphia and you brought him back in the car, what if anything did you do for him then? A. Well, he was not able to turn, like—you mean, in rubbing him and like that? The doctor gave me liniments and salves, and things.

Q. Yes. Just tell the Court and jury what you did for him yourself. A. I had to put hot cloths on his back and down his leg and thigh and on his arm, and then I had to rub the liniment in, or the salve, whatever it would be the doctor ordered. I had to feed him like a child at
211 first. The first week I had to hold his head up, and he was not even able—he did not seem to have strength enough to feed himself.

Q. During the time when you said he was in bed until after the holidays, did you give him this sort of treatment all during that period of time? A. While he was in bed?

Q. Yes. A. Yes.

Q. Did you use any ice packs of any kind? A. Yes, at first we used the ice packs.

Q. What portion of his body did you use those ice packs on? A. In and around the groin and in through here (indicating).

Q. Do you know how long you used ice packs on him? A. No; several times during the first few weeks.

Q. Has your husband worked since July of 1937, to your knowledge? A. No, he did not.

Q. Before this accident in 1936, state whether or not your husband worked regularly, to your knowledge. A. Yes. He worked, you know, as a structural ironworker. When he had work, he worked steady, and always was right there to do any heavy lifting or anything like that on the
212 job.

Q. Do you know what his average earnings were prior to this accident? A. In 1935?

The Court: He means before the accident.

By Mr. Offutt:

Q. Do you know what your husband's earnings were before this accident occurred? A. Well, for the year 1936, or 1935?

Q. For 1936 and 1935. A. Well, he made around ninety to one hundred dollars a month before that. Of course, wages were higher, and he made more.

Q. Ninety to one hundred dollars a month in what year? A. In the beginning of 1936 and 1935.

Q. Did he make over ninety to one hundred dollars a month in 1935? A. No. Some months he would. You know like structural iron work goes; sometimes they make in a week what they would make in a month, according to the job.

Q. What is Mr. Traynor's condition today as compared with what it was before this accident? A. Well, he appears to me to be very nervous at times.

Mr. Quinn: I object to the conclusion of the witness, that "it appears to me"—she is just stating a conclusion.

The Court: I do not think so.

213 (To the witness): You live right in the same house with him all the time?

The Witness: Yes, I do, your Honor.

The Court: State to the jury just what his condition is, as compared to what it was before he was hurt.

The Witness: Well, his condition after he got up and around, and he finished that work at Budd's and he was laid off there, and was very nervous, and at times he would get up at night and walk around—I know he would be up because I would see the light on, and he would say that he could not sleep, and then he would lay down for a while during the day and get up. He was very nervous at all times.

So finally he came down to his sisters'.

By Mr. Offutt:

Q. Was he able to sleep all night before this accident? A. Oh, yes, very much. He would not hear the alarm clock go off.

Q. Did he have any complaints before this accident like he had after the accident? A. Before? No.

Q. Did he ever have any headaches before this accident which required him to take medicine, before the accident?

A. No, I never knew him to have headaches; once in a while a cold, and that is about all.

Q. Did he have a physician attend him for any
214 reason before this accident, to your knowledge? A.

No, only for a cold. He would get a cold once in a while in the winter, and he would have Dr. Moleski attend to him when he would get a cold, or maybe go to the office and get something for that. That is about all. It never stopped him from work. He was never out sick from work.

Q. This medicine that you spoke of that you used, liniment and other medicines which the doctor directed you to give Mr. Traynor, can you give us some approximation, some idea of what that medicine cost you since this accident? A. Well, I really could not. I know each prescription ran around a dollar to one dollar and eighty cents. Some would be ninety-five cents. I really did not keep account of that.

Q. Can you think it over in your mind carefully and see if you can estimate approximately how much you spent over the period of time since this accident for medicines of that type? A. Well, it would be at least twice a week that the doctor, according to his condition—where he would have pains and all—I would say, oh, I imagine around thirty dollars or so, it would run.

Q. For the whole period of time since 1936 up to date?
A. Up until now?

Q. Yes. A. I thought you meant up until he started
215 to work, from the time he was just home.

Q. You can say that it cost about thirty dollars up to the time he went to work in May of 1937? A. Yes.

Q. Do you know how much was spent since that time for medicines? A. I really could not tell you, but so much we bought—liniments, and if anybody would tell him to get this liniment, he would get it, and different kinds of oils and things for rubbing.

Q. Do you know about the time he bought these various liniments and oils? A. Oh, yes.

Q. Do you know how much he paid for them? A. Some would be fifty cents a bottle, and some would be eighty or a dollar.

Q. You cannot give us any idea of how much was spent since 1937? A. No, I could not recall just what it was.

Mr. Offutt: No further questions. You may examine.

Cross examination

By Mr. Quinn:

Q. When did you say Mr. Traynor first left his bed after he got home? A. He first left his bed to walk into the bathroom—it was about the fourth or fifth week, and then
216 back to bed again.

Q. Four or five weeks after the accident? A. Yes.

Q. That would make it about the middle of November? A. Yes.

Q. And then he would stay in bed all the time after that until when? A. Then he stayed in bed until a day after New Year's. He came downstairs, step by step, like that.

Q. Don't you recall that he left his bed on November 4, and was walking about? A. No, not on November 4.

Q. Do you remember Dr. Treatmore coming to the house on November 8, 1936, to examine your husband? A. There was a doctor that came there to examine him.

Q. Wasn't your husband out of bed then? A. Well, he would get up and go in the bathroom, like I said.

Q. Wasn't he downstairs sitting in a chair when the doctor came? A. Not that I can recall.

Q. Hadn't he been out of bed for four days before that doctor called to examine him? A. No, I cannot recall.

217 Mr. Quinn: That is all.

Redirect examination

By Mr. Offutt:

Q. When Dr. Moleski attended Mr. Traynor, can you tell the jury what kind of treatment he gave him? A. Well, he strapped him with adhesive, and he told me—

Mr. Quinn: No.

Mr. Offutt: Not what he told you.

The Witness: And he bathed—

By Mr. Offutt:

Q. Did he give any electric treatments of any kind? A. No, he had the osteopath do that.

Q. What was the osteopath's name? A. He came about twice a week.

The Court: What was his name?

The Witness: Dr. Lightfoot.

By Mr. Offutt:

Q. And you say he came about twice a week? A. Yes. He could not stand any more than that.

Q. How long a time did he come, if you recall? A. The osteopath came until just before Christmas week.

Q. From October 18 until Christmas week? A. Yes.

Mr. Offutt: That is all.

I wanted to ask this witness one question, depending upon what you think about the consideration—

The Court: You can recall her.

Mr. Offutt: All right, your Honor. That is all. No further questions.

By Mr. Quinn:

Q. Is that osteopath still living? A. Yes.

Q. In Philadelphia? A. Yes.

Mr. Quinn: That is all.

By Mr. Offutt:

Q. What is his address? A. Right on the corner of A Street and Wishart Street.

Q. Do you know his first name? A. No, I cannot recall his first name.

Mr. Offutt: I want to call a physician. Does your Honor intend to sit until 12:30 today?

The Court: Yes.

Mr. Offutt: Call Mrs. Allen.

Thereupon **Mrs. Eleanor Allen** was produced as a witness on behalf of the plaintiff; and, after being first duly sworn, was examined and testified as follows:

219 Direct examination

By Mr. Offutt:

Q. Your name is Mrs. Allen? A. Yes, sir.

Q. What is your full name? A. Eleanor Allen.

Q. Where do you live, Mrs. Allen? A. 120 Adams Street, Northwest.

Q. Are you the sister of the plaintiff, William F. Traynor? A. Yes, sir.

Q. In 1936 did you live at 123 R Street, Northeast? A. Yes, sir.

Q. Where are you employed? A. St. Elizabeth's Hospital.

Q. Is that under the Interior Department? A. Yes.

Q. Directing your attention to October 17, 1936, did you learn at that time that your brother had been involved in an accident? A. Yes, I got a phone call.

Q. When were you when you first learned about it, and where? A. At 3 o'clock in the afternoon; I just got in from going to market, when the people next door told me,
220 and I didn't know which brother it was; they didn't know, and I had a crippled brother, and I thought it was he. So I got in my car, my sister and I, and we went down the highway.

Q. What highway? A. Well, I guess it is Bladensburg, and then out on the highway to Baltimore, and in Laurel someone on the road told me there was a car on the right-hand side in the ditch and a man sitting in it, and when I got down there I saw the car off on the roadside, and when I go there my brother was in the car and all crouched up, and I shook him and talked to him, and all he did was moan and moan. His arm was twisted up, and I went to move his arm, and he roared so loud I did not know what to do. I had to drive my car off on the side of the bank alongside of his car, and my sister and the boy and I—

Q. What do you mean by the boy? A. My nephew William; we dragged him out of that and pulled him into the back of my car and got him half way on the seat and half way on the floor and he didn't even open his eyes and did not speak. We kept talking to him, and all he did was moan and carry on, and I thought he was dying.

So we got his car and put it on the back of mine, and his car broke loose, and they pushed it into a garage, and I came in to Washington, and the first place I could think of was Freedmen's Hospital there. They took him out of the car there, the attendants and all, and put him on some kind of a wheeler and wheeled him into the hospital, and
221 as he was going in we stood alongside of him and he opened his eyes and he said something—I don't know what it was now; "My God, Sis," or something. That is the first he spoke from the time I brought him in, or even recognized us.

Q. Was the car that he was riding in left out where the accident— A. (interposing) We left it at the garage, just where it broke loose. There was a garage there, and a police held us up, and the police told my husband and

nephew to leave it there, and we did, and next morning my brother went and got it.

Q. What brother? A. My brother Tim. He is not in here.

We could not put him in the hospital; they did not have a bed for him. They said to take him home, because he had no money and we did not have any, and we took him home and tried to get him out of the car, and two men came along and helped us, and I went in and got an invalid chair and we wheeled him into the door and up the steps, and my sister went out and wired his wife and the family, and he sat in his chair all night, and they got there about 6 o'clock in the morning, and the next morning my other brother came in and he never moved from that chair. His son laid on the davenport alongside of him. We could not touch him, and they took him away to Philadelphia, and that is all I know.

222 Q. When did they take him away to Philadelphia?

A. About 2 o'clock—after dinner. We had dinner around 1.

Q. Before this accident, did you have occasion to see your brother often? A. Yes, we had an invalid brother, and an old mother. He was up and down occasionally; he and his son and family came up and down to see my mother.

Q. Would you see him when he would come here? A. Oh, yes.

Q. What was his condition physically before this accident? A. He was very healthy and strong; never knew him to be sick, never; always has been robust and healthy.

Q. State whether he was a man with a ruddy complexion or pallid complexion? A. Yes, he was much stouter than he is now, very flushed, and had been because he did out-of-door work. He would pick me up and carry me up the steps, and pick my mother up, and she was over 200 pounds.

Q. Is that so? He would do that alone? A. Absolutely. I was always afraid he would let her fall, and she would be afraid, but he would pick her up like I would pick up this pocketbook. He was the strongest in the family.

223 Q. Having in mind the date of this accident, October 17, 1936, when is the last time prior to that day you saw him doing something of that kind? A. Well, mother had died just previous to that.

Q. How long would you say? Can you give us an idea? A. She died a year before, four years yesterday, so that is

three years. He had been down before that. If we wanted anything moved or anything lifted, sister and I, he would come in and do it. He has carried the furniture from one room to the other, and when she was sick in bed, we had him and his wife and family all the time, just one year previous, and he would lift mother from one bed right into the other, because she could not move, and he would lift her bodily and carry her from one bed to the other, and my sister and I could not budge her.

Q. Since this accident, have you had occasion to see your brother? A. He has been with my sister and I for a year; I guess about a year.

Q. You mean, since 1938? A. Yes. He broke up his home. He had no means of keeping up his family. So we told him to stay with us, so he has been with us for over a year.

Q. Has he worked at any employment, to your knowledge, during that year? A. Only doing little turns around
224 the house, fixing the fire and keeping the place tidied up.

Q. What is his condition physically, as compared to before? A. He gets so tired, and complaining all the time of pains in his side. I have put plasters on it, and massaged him. He is always taking something for that pain. He really is a wreck, and, I am telling you, the man is not able to work. He could not do a day's work if he went out.

Mr. Quinn: I submit that that is going pretty far.

By Mr. Offutt:

Q. Have you seen him try to do any work around the house, that he did before this accident? A. No. We have not asked him to do anything that would hurt him, because he is always complaining of pain. If he lifts a bucket of ashes, he cannot carry it alone.

Mr. Offutt: That is all.

Mr. Quinn: No questions—just one.

Cross Examination

By Mr. Quinn:

Q. You said something about this car being in a ditch when you saw it at Laurel. A. Yes.

Q. Was it leaning over on one side? A. You know what I mean? It was off the concrete in this here low
225 place, like the side of a mountain.

Q. Was the whole car in the low place, or just one side side of it, so it was leaning over? A. It was down on that side a little bit (indicating), because we had to lift his shoulders up.

Q. Did you say that your brother at that time, when you went back to the car, had his arm all twisted back? A. Yes, he was laying back.

Q. How did you know his arm was twisted? A. It was back this way (indicating), and he was back over the side of the wheel, like he was trying to press himself to keep off his seat.

Q. And the first time he spoke to you is when you were taking him into Freedmen's Hospital? A. Yes, when they had him on a stretcher in the hospital, and he said something, "Oh, my God, Sis."

Q. I don't care for what he said, but that was the first time he spoke to you? A. Yes.

Mr. Quinn: All right.

Mr. Offutt: You may step down.

Thereupon **Thomas John Traynor** was produced as a witness on behalf of the plaintiff; and, after being first duly sworn, was examined and testified as follows:

226 Direct Examination

By Mr. Offutt:

Q. State your full name, Mr. Traynor. A. Thomas John Traynor.

Q. Where do you live? A. I live at 120 Adams Street, Northwest.

Q. In 1936, October, where were you living? A. Up the river; up the canal and river at that time.

Q. In the District of Columbia? A. District of Columbia, in a house boat. I had my own house boat up there.

Q. Are you married? A. No, sir.

Q. Are you the brother of William F. Traynor, the plaintiff in this case? A. Yes.

Q. Did you learn of an accident which he had, in which he was injured, in 1936? A. Well, I learned it by going home on a Sunday, to see my brother in a chair at home.

Q. In October, 1936? A. October, 1936.

Q. You mean—where were you? In Pennsylvania? A. No, I was in Washington, D. C., see? I went home on a

Sunday. I generally go home every week, and went
227 in the living room, and my brother was sitting there
on a chair, with his feet wrapped up in a blanket.

I said, "What is the matter?" He said, "Oh, my God; I think I am done for."

Q. What was his appearance then? A. He was in terrible pain, and suffering, and thought he was done for, see?

Q. How did he look? A. He looked terribly bad.

Q. Was his face florid? A. Sort of chalk-like, white, and dead like this (indicating), and he sort of hung down like that (indicating), and I thought he would die then.

Q. Did you stay in Philadelphia any time? A. Then his wife asked me, would I go in Philadelphia to hold his job.

Mr. Quinn: I object to that.

By the Court:

Q. Did you go to Philadelphia? A. Yes, sir, I went to Philadelphia.

Q. Then what did you do when you got there? A. I went to Philadelphia and took his place. He went on a Sunday, and I went Sunday night by train. He went with his wife and family.

Q. How long did you keep his place? A. I worked
228 in his job for two weeks, and I found out he would never go to work in two weeks, or November, and that is why I gave the job up. It was too hard work.

By Mr. Offutt:

Q. Before this accident, did you see your brother often? A. Well, I worked with him on several jobs. We were both ironworkers by trade, worked years together.

Q. Having in mind October, 1936, when is the last time you worked on a job with him? The year before? A. What year was it that—

Q. (interposing) 1936. A. I mean that the D. A. R. building was erected? That is the last job I worked on with him, but I worked with the same local that he worked at two or three years later.

Q. Was it within three or four years before the accident? A. About a year before that.

Q. Was he able to do his work all right? A. Oh, yes, always a good mechanic. I quit the work and went up the river.

Q. What was his physical condition before his accident?

A. He was a man.

Q. Was he a strong man? A. Yes, sir, plenty strong.

Q. As you have seen him since the accident, what
229 was his condition as compared to before, better or worse? A. Worse; terribly worse. He don't look the same. He don't walk and ain't got pep or anything else.

Q. Did you see him during the time while you were in Philadelphia, during those two weeks? A. I lived at his house then, those two weeks.

Q. What was his condition then? A. He was in terrible pain and suffering, groaning all the time. He was sitting up in a chair, and his son and me carried him upstairs in the chair he was sitting in a room and propped up with pillows. He could not lay down when I was there. When he stretched out, he groaned and could not move at all. He was complaining all the time.

Mr. Offutt: You may examine.

Cross Examination

By Mr. Quinn:

Q. Did you see him walk at any time while you were up there? A. No, sir. He tried to get up. His son and me tried to hold him, and he could not make it.

Q. When did you go to Philadelphia? The Sunday after the accident? A. The Sunday after the accident. I went to work Monday on his job the day after the accident. That was the 18th. I went to work the 19th.

230 Q. After you took him upstairs in the bedroom, he did not get in bed? You left him sitting in a chair?

A. That is right.

Q. And he was there the whole two weeks you were there?

A. He was there the whole two weeks I was there. We tried to get him up, and could not.

Mr. Quinn: That is all.

Redirect Examination

By Mr. Offutt:

Q. Do you remember whether he was in bed at any time in the two weeks that you were there? A. He got in the bed and could not lay down, and they propped him up and stuck

some pillows. He had a chair with pillows behind him that held him up, a chair turned upside down.

Mr. Offutt: That is all.

Call Mrs. Biondi.

Thereupon **Mrs. Minerva Traynor Biondi** was produced as a witness on behalf of the plaintiff; and, after having been first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Offutt: This is our last witness.

By Mr. Offutt:

Q. Will you please state your full name? A. Minerva Traynor Biondi

Q. You are the daughter of Mr. Traynor? A. That is right.

Q. Directing your attention to October 17, 1936, were you living with your father in Philadelphia? A. That is right.

Q. Did you learn about an accident in which he had been injured? A. Yes.

Q. After learning of that, did you come to Washington? A. That is right.

Q. When you came to Washington, did you see your father? A. Yes.

Q. Where was he when you saw him? A. He was in the front room, sitting in a chair.

Q. Where? A. In a chair, in the front room.

Q. Where? A. In the living room, in my aunt's house.

Q. Describe his appearance as you saw him at that time to the Court and the jury. A. Well, he did not seem to recognize anybody, and we went in and I asked him what was the matter and what happened, and he just laid there and moaned; that is all there was to it. I thought he was unconscious.

Q. Had you seen him when he left that morning? A. Yes.

Q. Was he all right then? A. Yes, fine.

Q. Did you accompany him when he was taken back to Philadelphia? A. That is right.

Q. What was his condition as to suffering on his way back to Philadelphia? A. Well, if it had been up to me, I

would have stopped at the first hospital and left him, because it seemed to me that he was dying. He was just moaning, and we just cried along all the way home, and every stop we would make, he would moan and moan. I thought maybe he had an inward condition that they did not tell us about while he was at the hospital.

Q. Prior to this accident, will you state what your father's condition was physically? Was he a strong man, a healthy man? A. Yes, he was, very.

Q. Had he been sick, to your knowledge, at any time? A. No. He was very healthy all his life, and he always did outdoor work and hard work.

Q. Did he work regularly? A. Yes.

Q. Was he active? A. Very.

233 Q. Since this accident, will you state whether he has been active? A. Oh, no. He has been a changed man all around. Anyone who knew him before would certainly see the difference in him, not only in his actions but in his appearance and everything else.

Q. Do you know of any occasion when he worked since this accident? A. Yes, he worked for the Budd Manufacturing Company.

Q. Do you know how long he worked for them? A. I cannot tell you exactly, but I think it was about three months.

Q. Since he worked for the Budd Manufacturing Company, to your knowledge has he ever worked anywhere? A. No.

Q. Do you know how long he remained in bed after he was carried back to your home in Philadelphia? A. I know it was after the Holidays, but I cannot tell you any definite date.

Q. Did you at any time while he was home do anything to aid him while he was suffering at home? A. Mother and I both helped. We rubbed his back with liniments, and his legs and knees, like that. Of course, we had to take his meals to him, and act as nurse, and everything like
234 that.

Mr. Offutt: That is all.

Mr. Quinn: That is all.

Mr. Offutt: That is our case, with the exception that we have one physician, whom we have learned—

The Plaintiff: He is out on call, and they say that he won't be back until 1 o'clock to his office.

The Court: He can be called and put on the stand later.

(To Mr. Quinn): Do you care to begin now?

Mr. Quinn: May we approach the bench?

(The following proceedings were then had at the bench, out of the hearing of the jury:)

Mr. Quinn: I have a physician from Philadelphia who is coming down, but he cannot get here today due to the fact that he has been subpoenaed to testify in some compensation cases.

The Court: How many witnesses have you?

Mr. Quinn: About five.

The Court: He can be called—would it be more convenient for him to be the first witness tomorrow morning, at 10 o'clock sharp?

Mr. Quinn: He can come down on an early train.

The Court: You can take the witness who is on the stand off.

Mr. Quinn: I imagine that we will finish with the rest of our testimony this afternoon.

235 The Court: Do you want to begin now?

Mr. Quinn: I would rather hear the doctor. If you could conveniently adjourn now, so that we can hear what the doctor has to say—

The Court: Can you get him here at half past 1?

Mr. Offutt: At the pretrial, the pretrial order will show that Mr. Quinn consented on the Maryland law as pleaded. It might be well to read that law as applicable at this time.

Mr. Quinn: It is quoted in your declaration.

Mr. Offutt: That used to be the practice, before we had the new rule.

The Court: I never saw pleas before that had laws in them.

Mr. Quinn: You did not have to plead the statute, like you do in Maryland, but under the ruling of the Court of Appeals, they have to plead mere municipal regulations, such as traffic regulations; they had to plead those, and one of the judges up there ruled that they not only have to refer to the chapter and section, but had to quote the language; but, as to statutes, you did not have to plead them at all; but Mr. Offutt pleaded this—this was the Maryland statute—he had a different proposition.

He can simply refer to the law. We have not any question about that law.

236 Mr. Offutt: The practice was before to read that law as applicable to the plaintiff's case. That is the way I understand the practice.

Mr. Quinn: As to traffic regulations.

Mr. Offutt: Even where it was a statute.

The Court: If it is agreeable, and I do not have to rule on the thing, necessarily, but if it is agreeable to both sides, you might read that statute.

Mr. Quinn: It is not long.

The Court: You can do that now.

Mr. Offutt: There is one other thing. Have you had a chance to look over those cards?

Mr. Quinn: Not as thoroughly as I would like. I will look them at lunch. We might make out what it says.

Mr. Offutt: I gave you a typewritten copy.

Mr. Quinn: That is not the same as the cards. That is a report of the doctor.

(Proceedings at bench ended.)

The Court: You may proceed.

Mr. Offutt: It has been stipulated between counsel that this is the law which was in force and effect in the State of Maryland regarding the operation of motor vehicles at the time of this accident.

"Section 194, Subtitle 1. General Provisions, under the heading of Reckless Driving.

237 "No person shall operate a motor vehicle of any kind, as defined in this subtitle, over any public highway of the State recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property and life or limb of any person."

Then there is Section 194, Subtitle 3, "Speed of Other Vehicles" under the heading of "Speed of Vehicles with a Commercial Body"—I don't think that applies at this time.

The Court: Whatever you gentlemen can both agree to.

Mr. Offutt: Section 195.

"When Speed is to be Reduced.

"Upon approaching any person walking in the traveled portion of any public highway, or a horse or any animal

being led, driven or ridden thereon, or a crossing of the intersecting public highway, or a bridge, or a sharp turn or a curve, or a steep descent, and also in passing such person or such horse or other animal approaching or traveling such crossing, bridge, curve, or descent, the person operating a motor vehicle shall have the same under control and shall reduce the speed to a reasonable and proper rate."

Now, the Rules of the Road, under heading "Keeping to the Right," and "Rules for Passing."

238 "All vehicles, motor, horse-drawn or otherwise, when being driven upon the highways of this State shall at all times keep to the right of the center of the highway upon all highways of sufficient width, except upon streets or roads where traffic is permitted to move in one direction only, and except where overtaking and passing another vehicle, and unless it is impracticable to travel on such side of the highway, and in rounding curves shall keep as far to the right of the center of the road as is reasonably possible."

Mr. Offutt: That is all that I have to offer.

The Court: Will your physician be in position to go on?

Mr. Fonbuena: I can get in touch with him by 1 o'clock.

The Court: The Court will take a recess until half past 1.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:30 o'clock.)

After Recess

1:33 o'clock p. m.

Upon the expiration of the recess, the hearing was resumed.

Mr. Offutt: See if Dr. Warfield is outside.

(The bailiff reported that he was not.)

Mr. Offutt: I understand that Dr. Warfield is on his way, but apparently he is not here yet. We might dispose of this matter with Mr. Quinn; Mr. Quinn asked if he could
239 look into the matter of those records.

Mr. Quinn: We will agree that as far as the cards are concerned, they may be received in evidence.

The Court: What do you have to say about that?

Mr. Offutt: The only purpose I had, as explained to the Court—

The Court: I understood that.

Mr. Offutt: But I understood Mr. Quinn was to consider whether or not we could agree on those dates.

The Court: Mr. Quinn cannot agree—is that what I understand?

Mr. Quinn: I agree on the dates on the cards which the son testified to were taken from the card index in the father's office.

The Court: Counsel have said that part of the dates were on the sheets and not on the cards. All the dates on the sheets are on the cards.

Mr. Offutt: How many dates that are not on the sheets are on the cards?

Mr. Quinn: About one-half on the cards and about one-half on the sheets.

The Court: Is that correct? Half on the cards and half on the sheets?

Mr. Quinn: Yes, sir.

The Court (to Mr. Offutt): I did not so under-
240 stand you. I understood you to say that they were all on the sheets.

Mr. Offutt: They are all on the sheets, and about one-half of them are on the cards.

The Court: All right, sir.

Mr. Quinn: We will agree that these cards and the sheets show—

The Court: If what you are going to agree to is agreeable to the other side, I think it would be best not to talk about it, but let it go in, if you have agreed.

Mr. Offutt: We are going to agree on the amount of the visits as shown by those cards, the number of visits, and that is all without any reference to what may be on the cards, and that will amount to \$447. as I understand it.

The Court: All right.

Mr. Quinn: We of course do not agree it was all necessary. We just agree that those are the doctor's records.

The Court: You agree that the doctor's records show that? Is that correct?

Mr. Offutt: That is right.

Mr. Quinn: I do not think that requires any further explanation to the jury.

The Court: Well, of course, the jury have a right to have before them that evidence in any shape in which you can

argue it. You can speak about it in your closing arguments or you can show it to them now, if you have it in
241 convenient form, so that they can see it.

Mr. Offutt: If your Honor will indulge me just a moment, I think that we can get it straightened out.

The Court: Why don't one of you gentlemen just tell the jury how many visits the record shows, and how much the amount is, and stop right there, and through what length of time the visits were made?

Mr. Quinn: As far as we are concerned, so that there won't be any misunderstanding and the jury be confused, we will agree that the cards and the sheets he talks about can all go in, and they can be used for whatever purposes they see fit. We can use them the same way, and keep them all together, the doctor's findings, and so forth.

Mr. Offutt: Mark those, please.

Mr. Quinn: Which paper?

Mr. Offutt: No, mark them altogether and clip them. Clip the cards together, cards, papers and all the papers together.

(At this point Dr. Moleski's cards and other papers were marked Plaintiff's Exhibits 5 and 6.)

Thereupon **Dr. William A. Warfield** was produced as a witness on behalf of the plaintiff; and, after being first duly sworn, was examined and testified as follows:

242 Direct Examination

By Mr. Offutt:

Q. Will you state your full name, Dr. Warfield? A. William A. Warfield.

Q. Where do you live? A. 1522 R Street.

Q. Do you have offices here in the District of Columbia? A. Yes, at 1817 Thirteenth, Northwest.

Q. Dr. Warfield, are you a practicing physician in the District of Columbia? A. Yes.

Q. How long have you practiced and been engaged in the practice of medicine in the District of Columbia? A. Since 1894.

Q. You are licensed so to do? A. Yes.

Q. Are you a graduate of any medical school? A. Yes, of Howard University Medical School.

Q. Have you been connected with any hospital during your practice? A. Yes, I have been connected with Freedmen's Hospital—I was up until 1936, since 1901.

Q. In what capacity were you connected with Freedmen's Hospital? A. At first I was an intern, then second
243 assistant, first assistant, and, subsequently, surgeon in chief for thirty-five years.

Q. Were you surgeon in chief at Freedmen's Hospital when you were last connected with it? A. Yes. I retired on account of the statutory limitation in 1936.

Q. You mean by that, because of the age limit? A. Yes.

Q. You are over 70 years of age?

The Court: Don't question the doctor too closely. He does not look to be 70 years.

The Witness: I will be 73 the 17th of next month.

By Mr. Offutt:

Q. Now, Dr. Warfield, are you acquainted with the plaintiff, William F. Traynor, here? A. Yes, I am.

Q. In April of 1938 did you have occasion to examine the plaintiff? A. I did, yes.

Q. And as a result of that examination, will you tell the Court and jury what you found upon your examination?

A. He gave me a history, as I recall, of having received a severe injury about a year previous to the time of my examination. At that time, at the time of my examination, he
244 complained of pains in his back, on turning of the body, and also the hip. He was very nervous, which in my opinion was the result of neurasthenia following a trauma.

Q. Do you have any records which you kept in connection with your examination made at that time? A. The only records I have is the report that I made.

Q. Have you stated to the Court and jury all of the information, all of your diagnosis at that time as to his condition? A. Yes. I think, in my opinion, that he was suffering from neurasthenia due to a trauma.

Q. Can you state, in your experience—

The Court: When you say neurasthenia due to trauma, do you mean something that corresponds to what I am about to say; Do you mean that he was suffering from a nervous affliction due to shock? A. Well, yes, sir, that is about it—due to shock. As a result of that injury, he had lost con-

siderable nervous energy, which helps to produce this condition.

By Mr. Offutt:

Q. Did you have before you any information at that time, as you made your diagnosis, as to how long he had been in bed, and what the complaints were that he had, at the time of the accident and after the accident? A. Yes, he complained that he was in bed at least five months, that he could not walk for four months, and after that he could
245 with the use of a cane.

Q. Did you have any information regarding the injury to his leg? A. He complained of pains in the hip. There was nothing that I could view with the eye showing that injury which had happened a year ago.

Q. Will you explain to us, Doctor, what you mean by a trauma? A. That is an injury.

Q. And the neurasthenia which you have spoken about, can you explain that any clearer to us? A. That is a nervous exhaustion.

Q. Can you state whether or not, in your opinion, that was directly traceable to the accident? A. That is my opinion.

Q. In your opinion, Doctor, having in mind that this accident occurred October 17, 1936, and the patient, from your examination on April 24, 1938, was still suffering, can you state what in your opinion would be the likelihood of the continuation of this condition? A. Well, it is very difficult to say, but here is a man who, according to his history, had been in good health. He was a hard-working man, as I recall, and, having this injury, being the head of a family, there was much anxiety following that, being in bed five months, I believe it was, and unable to walk, and then
246 after that only with a cane. It is most natural that a man of that sort would lose nervous energy and suffer from neurasthenia, what is called neurasthenia, nerve exhaustion.

Q. Doctor, what is your opinion as to the permanency of this condition? A. It might continue indefinitely. That is a difficult question to answer.

Q. Having in mind that it has continued from October 17, 1936— A. Well, it is liable to continue indefinitely.

Q. Is it reasonably to be expected to continue indefinitely, in your opinion? A. I think it is fairly reasonable.

Q. Did you render a bill, Dr. Warfield, for your professional services? A. I do not recall. Perhaps I did.

Q. I show you this— A. Oh, yes; that is mine.

Mr. Offutt: Will you mark this, please?

(Bill of Dr. Warfield marked Plaintiff's Exhibit No. 7.)

Q. What was the charge that you made? A. \$25.

Q. Is that a fair and reasonable charge, Doctor, for the service that you rendered? A. Yes, I think so.

247 Mr. Offutt: That is all.

Cross Examination

By Mr. Quinn:

Q. The \$25 that you charged, was that simply for the one examination of the man? A. Yes, sir.

Q. You did not give him any treatment whatever to relieve this neurasthenia? A. No, sir.

Q. Did it also include the cost of coming to court and testifying, that \$25? A. I had not thought of that, but I do not think—

Q. Do you mean to say—

Mr. Offutt: Let him finish.

The Witness: I had not thought of that. When that bill was made, I had no idea of coming into court.

By Mr. Quinn:

Q. Then the \$25 was simply charged for one examination of him? A. Yes.

Q. How long did it take? A. Well, less than an hour.

Q. What sort of an examination did you make of him?

Did you strip him? A. Yes.

248 Q. And examine his back and his muscles? A. His back and his hip and his muscles.

Q. What did you find with respect to his back and his muscles? Did you make any finding at all? A. Well, he complained of pain on pressure, on palpation. There were no objective symptoms; all subjective.

Q. By objective symptoms, you doctors mean something you can see or feel? A. Yes.

Q. And subjective symptoms are simply what the patient tells you? A. Yes.

Q. So far as the subjective symptoms are concerned, you rely entirely upon the patient telling you the truth? A. Exactly.

Q. Did you find any muscle spasm? A. No, not to amount to anything.

Q. Isn't it true that if there is any condition of the back that should cause a man to be uncomfortable or weakened there, that when you pressed on his back and examined him, you would get a reaction in the way of a muscle spasm? A. His reaction was pain on pressure.

Q. But you did not find any muscle spasm? A. In some cases you do not get it.

Q. You did not get it in his case? A. No.

249 Q. I understood that he told you that he was not able to walk for five months. A. That is my recollection.

Q. In making your diagnosis of his trouble, you took into consideration everything that he told you in the way of a history of the case? A. Exactly.

Q. Which included the sort of injuries that he received, and how long he was unable to walk, and all that? Is that true? A. Yes.

Q. If you found out that the man was able to walk just about two weeks after the accident, and did then walk, instead of five months after the accident—if he had told you that, it would have made a difference in your opinion? A. I do not know. It depends on what other things he told me.

Q. What other things did he tell you? A. I would not want to say—what is that?

Q. What other things did he tell you besides this inability to walk for five months? A. I do not recall the entire conversation we had.

Q. Did you make any record at all of the examination? A. I made some notes, and then presented it to Mr. Fonbuena, in the form of a report.

250 Q. May I see the report?

(Paper handed to examining counsel.)

Q. I notice in this report which you made under date of April 24, 1938, you say that his right hip and spine suffered the greatest damage, and that it must have been very severe since he could not walk for about five months thereafter, and then only with the aid of a cane. A. Yes.

Q. So that was the most severe thing he told you about?
A. Yes.

Q. And I ask you, in the light of that, if you found that the man was able to walk without a cane on November 4, 1936, with the accident happening on October 17, would that make a difference in your opinion? A. Well, it may be possible for the man to walk at that time with great difficulty and pain, and so forth. I don't know if that was the case with Mr. Traynor.

Q. You found, did you not, on your examination of him, that there was no dis-union of the hip joint? A. Yes.

Q. Meaning that his hip joint, so far as you could find, was entirely normal? A. In place.

Q. And the head of the hip bone was in place, and the spine was in line? A. Yes.

251 Q. Such as a normal person, who had no injury, would have? A. Yes, sir.

Q. You found that this man is suffering from neurasthenia subsequent to trauma. Can you put your finger on any injury that he told you about that would cause this neurasthenia, any injury to the nerves? A. The injury he had, according to the history, which kept him in bed for five months and could not walk, is sufficient to include that.

Q. Would that cause an injury to the nerves? A. His great anxiety, as I explained a while ago. Here is a man, the head of a family, who had been in good health, and he suddenly has an accident which lays him up for five or six months or more. There is an expended nervous force on account of anxiety; he has nervous exhaustion, resulting in neurasthenia.

Q. You call that traumatic neurasthenia? A. Yes, due to an injury.

Q. Do you doctors also have a term known as "litigation neurasthenia"? A. I do not recall it.

Q. Haven't you recalled that discussed in the medical profession? A. I do not know that I can answer that.

252 Q. The type of neurasthenia that disappears when the litigation is over, win or lose? A. Yes, I have heard of that.

Q. And you have found in your medical practice, haven't you, that there is such a thing as litigation neurasthenia? A. Well, I think so—not necessarily neurasthenia, but any other condition.

Q. It is a condition that clears up when the litigation is over, whether the man wins or loses. A. Yes, I have heard of those things.

Q. You say at the conclusion of your report—

“I take the view that, for the most part, a psychological disturbance, due to the injury and arising from suggestion, is the main abnormal condition, which may run an indefinite period.”

What do you mean by that term, “arising from suggestion”? A. Well, that is a suggestion of his own. He has had an injury, and he suggests within himself.

Q. Has that any connection with the litigation neurasthenia I have been talking about? A. Not that I know of.

The Court: That is, more clearly, like shell shock.

Mr. Quinn: Well, it may or may not be, your Honor.

The Court: What the doctor is testifying to is.

253 Mr. Quinn: I do not know about that. He speaks about it being a psychological disturbance.

The Court: That is what shell shock is.

Mr. Quinn: I have always understood—

The Court (continuing): And when I was in Congress, I had over two thousand cases where you could not find an objective symptom to save your life, and here were these men whose nervous symptoms were simply destroyed, and without any objective symptoms.

Of course, I am not undertaking to say anything about whether he had litigation neurasthenia or otherwise, but I am just undertaking to tell you what the doctors—

Mr. Quinn: Did your Honor hear of litigation neurasthenia when you were in Congress, or at the bar?

The Court: I never heard that term used, but I have no doubt I know what it refers to.

Mr. Quinn: That is all—one more question.

Q. Did you examine him any further after that one date you mentioned? A. No.

Q. In April, 1938? A. No.

Q. By the way, were you connected with Freedmen's Hospital in October, 1936? A. What was your question?
254

Q. Were you connected with Freedmen's Hospital in October, 1936? A. Well, I will explain it this way. I left officially on December 17, and had an accumulative leave

of sixty days. I was not there, but I was officially connected.

Q. Did he tell you that he had been taken to Freedmen's Hospital on the day of this accident? A. I don't recall.

Q. Or did you make any examination of any records at Freedmen's Hospital to find out what was done there before you made your diagnosis? A. No.

Mr. Quinn: That is all.

Redirect Examination

By Mr. Offutt:

Q. Dr. Warfield, Mr. Quinn asked you if you had ever heard of litigation neurosis.

Mr. Quinn: Neurasthenia.

By Mr. Offutt:

Q. And you said you could not recall exactly that term, but I think you said later you understood what he meant.
A. Yes.

Q. Doctor, in your opinion, has this man whom you examined on that occasion that type of neurosis which
255 Mr. Quinn was asking you about or this traumatic neurasthenia which you referred to in your report?
A. I do not think so. I did not have the slightest thought it was that sort of neurosis, that he was proceeding along that line.

Q. In your opinion, it is the psycho-disturbance that is connected with traumatic neurasthenia? A. That is right.

Q. Do you have any interest in the outcome of this case one way or the other? A. Absolutely none.

Q. Did you ever see me about this case before you came down here in connection with this trial? A. No.

Q. Back in 1936, October, did you examine this plaintiff, Mr. Traynor? A. It was in April, wasn't it?

Q. Yes; April, 1938, that you made your examination, but in October, 1936, is when he was injured in the automobile accident. Did you examine him in October, 1936? A. No.

Q. At Freedmen's Hospital? A. No, sir.

Mr. Offutt: I offer his bill in evidence. Do you make any objection?

256 Mr. Quinn: I submit that it is not a proper bill.
There is no testimony here that any service was rendered in the way of treating the man or giving him any

advice, simply that he examined him, and I submit that it is not recoverable.

The Court: I think that the bill is admissible for whatever weight the jury sees fit to give it. The natural assumption would be that this man's condition continued, and he and his family, or his family, wanted expert advice about the possibility of its continuance, and for that reason they had the examination made. I suppose that that is the explanation for it.

Mr. Offutt: Yes, sir.

The Court: Of course, that being the logical conclusion to reach, I should think that the bill was proper to go to the jury for whatever weight the jury wishes to give it.

The Court overrules the objection.

Mr. Offutt: That is our case, if your Honor please, and we rest.

Mr. Quinn: Call Officer Santee.

Thereupon **Lester H. Santee** was produced as a witness on behalf of the defendant; and, after being first duly sworn, was examined and testified as follows:

257 Direct Examination

By Mr. Quinn:

Q. State your full name. A. Lester H. Santee.

Q. What police force are you connected with? A. Maryland State Police.

Q. How long have you been a member of that force? A. A little over three years.

Q. Were you a member of that force in October, 1936? A. Yes, sir.

Q. On October 17, 1936, have you any independent recollection of investigating an accident that happened at Conowingo Road and Broadway Avenue? A. From memory?

Q. Yes. A. No.

Q. Since that time, have you investigated quite a number of accidents in the course of your duties as an officer? A. I have.

Q. And you have been involved in one of your own, haven't you? A. That is correct.

Q. And badly injured in that? A. Yes, sir.

258 Q. When you investigate accidents, are you required to make any report of same? A. By department rules, yes, sir.

Q. By the department rules of your State Police Department? A. That is right.

Q. Did you on October 17, 1936, complying with those rules, make a report concerning an accident at Conowingo Road and Broadway Avenue? A. I did.

Q. To whom would you turn in that report? A. To the headquarters.

Q. The headquarters of your department? A. Yes, sir.

Q. Did you make such a report? A. Yes, sir.

Q. Have you that report with you? A. I do.

Q. Will you produce it?

(The witness did as requested.)

Q. Where did you get that report after you turned it in, before you came here to court? A. From our headquarters file.

Q. Is this your signature at the bottom of this report, Lester H. Santee? A. Yes, sir.

259 Q. Whose signature is that down below? A. Sub-Station Commander Haddaway.

Q. You came directly under him? A. That is right.

Q. And he signed the report? A. Yes.

Mr. Quinn: Will you mark that?

(Report of Officer Santee, of October 17, 1936, of collision in question, marked Defendant's Exhibit B.)

Mr. Quinn: I offer this report in evidence.

The Court: The Court will rule that he has a right to use the report to refresh his recollection, but in view of the fact that he is here himself, the report cannot go in without independent evidence.

Mr. Quinn: May I call your Honor's attention to a provision of the U. S. Code?

The Court: The rule, I think, would be different if he was not here himself, and could not be brought here conveniently.

Mr. Quinn: In this Section 695 of Title 8 of the United States Code Annotated—

The Court: That is the one called to my attention yesterday?

Mr. Quinn: It may be. What was that section?

Mr. Offutt: 695.

The Court: Another question I would like your
260 opinion about now. Of course, if I found that it had
to be done in order to work substantial justice, I
would have to rule like I did, whether it was right or whether
it was a mistake. In matters of substantive law, the Mary-
land law would have to apply. In matters of procedure,
the District law would apply. The question arises as to
whether the admission of evidence is a matter of substan-
tive law or a matter of practice.

Mr. Quinn: I think it is a matter of practice.

The Court: I rather think you are right.

Mr. Quinn: In this section, you will notice the wording
of it:

“In any court of the United States and any court estab-
lished by act of Congress, any writing or record, whether
in the form of an entry in a book or otherwise made as a
memorandum or record of any act, transaction, occurrence
or event, shall be admissible as evidence of said act, trans-
action, occurrence or event, if it shall appear that it was
made in the regular course of any business, and it was the
regular course of such business to make such writing or
record of such act, transaction, occurrence or event.

“All other circumstances of the making of such writing
or record, including lack of personal knowledge by the en-
trant or maker, may affect the weight, but it shall not affect
its admissibility”

and so forth.

261 Under this section our judges have been admitting
in evidence the reports of traffic officers in the Dis-
trict of Columbia of accidents which they are required to
report on. They have word that an accident occurs, and
they may go to the hospital, they may or may not see the
drivers or talk to them, they may see certain marks on the
roadway, and they make up a report and that is sent in to
headquarters, to the Traffic Bureau, and one copy is kept
at the Traffic Bureau and one at the police station.

The Court: This Court is not going to undertake to
interpret that statute in a way—how long has the statute
been passed?

Mr. Quinn: It was passed June 20, 1936.

The Court: The Court will not undertake to overrule
the practice here in the District. The Court's opinion is

that that statute was passed to cover cases where records were obviously records, and where the primary evidence was not available. That is the way the Court would feel like ruling, if it is a matter of first instance, but if you agree that the practice which Mr. Quinn has stated prevails in the District—

Mr. Offutt: I believe that is the practice. There is only one judge that does not follow it, and that is Mr. Justice Bailey. In a case I tried before him, he refused to follow that.

262 Mr. Quinn: In a case you and I tried, he admitted most of the record, with one exception, where there was some—

Mr. Offutt (interposing): In order that your Honor will not be confronted with that point, I am willing to admit it.

The Court: All right; that settles it.

By Mr. Quinn:

Q. Officer, will looking at this report refresh your recollection in any way concerning what you saw over there?

A. It does not.

Q. You have looked at it? A. Yes.

Q. It does not call back the accident to your mind? A. No, sir.

Q. When did you have this accident in which you were involved and were injured? A. September of 1937.

Mr. Quinn (to the jury): Gentlemen, this is on the letterhead of the Maryland State Police, and it reads:

“Sub-Station ‘D’, Benson, Maryland.

“October 17, 1936.

“To: The Commanding Officer, Maryland State Police Headquarters, Baltimore, Maryland (Thru official channels)

“Subject: Accident case of William F. Traynor, Philadelphia and George W. Emmert, Alexandria, Virginia.

263 “1. Respectfully report that at 8:08 this A. M. a call was received at this sub-station reporting an accident at the intersection of Broadway Avenue and Conowingo Road on Route #1. I proceeded to the scene of the accident and upon information received from the op-

erators of the cars involved I have the following to report.

"2. George W. Emmert, who had in his possession a Virginia Operators card #450080 and was operating a Ford Tractor-Trailer belonging to Nu-Car Carriers, Inc. of Alexandria, Virginia, bearing Virginia Tags T H 14145, had been northbound on Broadway when struck at the intersection of Conowingo Road, at 'blinker light' by a Ford Coupe owned and operated by William F. Traynor of Philadelphia, who had in his possession Pennsylvania operators license #1487638 and whose car bore Pennsylvania tags #3D869, which had been eastbound on Conowingo Road and had attempted to make a right turn into Broadway.

"3. Mr. Traynor had been injured to some extent and was taken to Dr. Davis of Belair, Maryland, for examination, where he was found not to be seriously injured and was released to take care of himself as he saw fit. He complained of an injured right leg, which was found to be temporarily paralyzed by force of impact, also of sore chest and 'catch' between shoulder blades.

"4. Both operators were taken before Judge S. S. Spencer of Belair, Maryland and charged with violation
264 of Section 194, Art. 56 'Reckless Driving'. Mr. Emmert plead Not Guilty, was found Not Guilty and his case dismissed. Mr. Traynor plead Guilty, was found Guilty, and fined \$1.00 and costs of \$.75.

"5. Condition of road, good, wet; visibility good, light rain; intersection.

"6. Case closed.

"Lester H. Santee, Officer

"Maryland State Police.

1st Ind.

"Sub-Station 'D' Maryland State Police, Benson, Md., Oct. 17, 1936.

To: The Commanding Officer, Headquarters, Baltimore, Maryland.

Forwarded: For your information.

E. S. Haddaway."

Q. Officer, are you familiar with that intersection of Conowingo Road and Broadway Avenue? A. I was at the time of the accident. However, I have been away from there for two years.

Q. What was the nature of the turn at that intersection at the time of the accident, October 17, 1936? A. In what respect?

Q. Could you draw us a diagram? We have a 265 couple on the board. A. I can approximately, yes, sir.

Q. Suppose you step down here.

The Witness (at the blackboard): This point, as you are coming out of Bel Air, is the street known as Broadway, a two-lane road, and Conowingo Road would be coming in this direction (indicating). This point over here (indicating) is a small road; it is gravel, not macadam; that is a continuation of the macadam which goes to intersect with Route 22, to Churchville.

The blinker light would be in that position (indicating), at the time of this accident, on this corner (indicating), this being Conowingo Road, and Mr. Traynor's car was being operated in this direction and Mr. Emmert's car would have been operated in this direction (indicating).

At the time of this accident, and the reason I can recall this so well is because I had a lot of difficulty in an effort to remove certain shrubbery from this section in here (indicating), the visibility was very poor there (indicating), in other words, impossible to see around that intersection when you were approaching it.

I don't recall exactly, but I believe the curb line was practically opposite here (indicating), the end of the curb. In other words, there is no curbing on Conowingo Road, but there was curbing on Broadway, and to the best of my knowledge there was no curveline across the intersection.

266 Q. No curve line? A. Across the intersection.

Q. What do you mean by that? A. This is a continuation. In other words, traffic coming out Broadway and remaining on Route 1 makes a left turn. There is a stop sign here and also one here for this road (indicating). This (indicating) is a through road, and normally now intersections are marked with a curve.

Q. That is this white line that comes down the center of the road and continues around the curve? A. That is right.

And at that time, to the best of my recollection, there was no line there. I believe that there was a line that came up to this point (indicating); I am not sure.

Mr. Offutt: What was your last answer?

The Witness: I am not sure about the line on this road (indicating).

Other than that, I don't know that there is much that I can say about that intersection.

By Mr. Quinn:

Q. Was there any grade on Conowingo Road as you approached the intersection toward Broadway? A. Yes, there is a slight downgrade approaching the intersection.

Q. About how far back from the intersection did
267 that grade start? A. I estimate it at 75 yards.

Q. Were there any speed signs on Conowingo Road as you approached the intersection? A. Yes, sir, there are.

Q. At the time of the accident? A. Yes, sir, at the time of the accident there were. As you approach Bel Air, on the Conowingo Road, the 25-mile zone begins about a quarter or half a mile before you reach this intersection.

The Court: It begins right at the boundary of Bel Air.

The Witness: I am not sure where the boundary is, your Honor, but it is approximately one-quarter or a half a mile from this intersection as you approach it. Just beyond this intersection, or before you reach the intersection, is the beginning of the 20-mile zone.

By Mr. Quinn:

Q. About how far back is that 20-mile speed sign from the intersection? A. There is at this point, where we have this little downgrade approaching the intersection, a hump in the road, so to speak. Beyond that, possibly 25 yards.

Q. That would make it 100 yards altogether to the intersection? A. Yes.

Q. And that is 20 miles? A. 20-mile zone at the in-
268 tersection.

Mr. Quinn: That is all.

Cross Examination

By Mr. Offutt:

Q. Officer Santee, you personally do not recall the occurrence on this morning at all, of October 17, 1936? A. No, sir, I do not.

Q. And the only knowledge which you have of what the conditions were that morning and what occurred is that which is contained in here—isn't that right? A. That is correct.

Q. And you got this information from a lot of people, didn't you? A. No doubt.

Q. You don't know exactly who you did get the information from? A. Other than the fact that I got it from the operators.

Q. You say you did? A. I believe that is stated in the report.

Q. You mean in paragraph 4? A. No, sir—"from information received from the operators." I believe the report points out that fact.

Q. George W. Emmert—is that what you mean? A. Just prior to that.

269 Q. Show me what part you got from the operators.

A. "And upon information received from the operators of the cars involved."

Q. That is paragraph 2, isn't it? A. Yes.

Q. Reading from paragraph 2—

"George W. Emmert, who had in his possession a Virginia Operators card #450080 and was operating a Ford Tractor-Trailer belonging to Nu Car Carriers, Inc. of Alexandria, Virginia, bearing Virginia Tags T H 14145, had been northbound on Broadway when struck at the intersection of Conowingo Road, at 'blinker light' by a Ford Coupe owned and operated by William F. Traynor of Philadelphia, who had in his possession Pennsylvania operators license #1487638 and whose car bore Pennsylvania tags #3D869, which had been eastbound on Conowingo Road and had attempted to make a right turn into Broadway."

That information you got from the operators, and you mean both operators of the cars? A. That is what the report reads.

The Court: No, that is not the question, what the report reads.

The Witness: I have already stated I do not recall personally just what the procedure was.

270 By the Court:

Q. Do you mean that both operators, Mr. Traynor and this other, were taken to the magistrate's office? A. Yes—I would not say in the office. I understand there is some question about that.

Q. You understand there is some question about it? A. Yes.

Q. You mean that you have learned that since you came here? A. No, sir; prior to the time I came to court.

Q. You have not that in your report? A. No.

By Mr. Offutt:

Q. You did not know there was any question about that when you made out this report? A. About which?

Q. When you made this report in October of 1936, you did not know there was any question about it, did you? A. In what regard?

Q. In any regard. A. No, I did not know there was any question about it.

Q. You have here that the Ford car was owned and operated by William F. Traynor. Did you see the registration card? A. Undoubtedly.

Q. Take a look at this and see if that can refresh
271 your recollection about whether you did or did not see it. A. No.

Q. Do you know who told you—do you know which one of the operators told you this, that the truck was struck by a Ford coupe which had been eastbound on Conowingo Road and had attempted to make a right turn into Broadway? A. No, sir, I cannot tell you anything about that.

Q. Do you know now whether or not the truck driver was injured? A. No, sir, I don't know that, except by the report.

Q. Is there anything in this report— A. Nothing in that report, I don't think.

Q. (resuming) —to show that the truck driver was hurt? A. I don't believe so.

Q. Do you remember now whether Mr. Traynor, the driver of the Ford car, was injured? A. No, sir, not from memory, but it is in the report.

Q. In the fourth paragraph there is something here about both drivers being taken before Judge Spencer. Do you know whether you were there present when they were taken before him? A. Offhand now, no, sir, except—

Q. If you don't know that, do you know whether Mr. Emmert pleaded not guilty there? A. Not from memory, no, sir.

272 Q. You do not know whether Mr. Traynor pleaded guilty? A. Not from memory, no, sir.

Mr. Offutt: That is all—one other thing.

Q. You say you did not know—I am not sure, but I think you said that that line in the center of the highway was on Conowingo Road. A. That is right.

Q. Are you sure that the sign with 20 miles an hour on it was on Conowingo Road just one hundred yards away? A. Yes, sir.

Q. Is that the only sign which showed the speed? A. 25-mile sign further down.

Q. How far down was that? A. From a quarter to half a mile from the intersection.

Q. Do you remember that? A. Yes, sir. I worked that territory regularly as far as speed is concerned.

Q. Have you been over there lately? A. No, sir, not since 1937.

Q. That turn right here (indicating) appears to be almost at right angles? A. Yes, sir.

Q. Wasn't that a curve at the time, a little curve? A. If there was any curve there, it was hardly noticeable. It is a very sharp turn to the right.

273 Q. It is a very sharp turn to the right, but wasn't there a little rounding here of the curve, rather than coming to a right angle? A. There may have been a slight curve there.

Q. You have not been there since 1936? A. No.

Q. I show you plaintiff's exhibit No. 3, and ask you to examine that and see if you can tell us if that truly represents the turn and the condition of the roadway beyond as it was in 1936. A. With one exception, I believe.

Q. What is that? A. It appears that there has been an addition made here (indicating) that I don't recall.

Q. The addition that you indicated, that is on the north side right near where there is a little black pen and ink mark on there? A. Yes, sir.

Q. How much of that addition has been made, in your opinion? A. What do you mean, number of feet? I would not be able to judge that by the picture.

Q. Can you mark it on there, how much of it has been made? A. I could only see what other people see
274 here. I can see, it seems to me, the edge of the original road which was right there (indicating).

Q. Will you put a mark on there? A. I don't want to obliterate the line, but it is visible here.

Q. Your mark is to the right of the other mark? A. That is right.

Mr. Offutt: May I exhibit that to the jury?

The Court: Yes.

By the Court:

Q. Officer, that hedge or bushes or whatever it was that obscured the vision on the Conowingo Road, did those bushes or hedge appear on the Broadway road to the same extent that they did on the Conowingo Road? A. You mean, in so far as cutting off the visibility?

Q. On one side as well as the other? A. The view was obstructed in both directions, yes, sir. Of course, a high object might have been visible from Broadway, but a normal automobile would not have been visible.

By Mr. Offutt:

Q. I think you said that a normal automobile would not be visible from either side? A. Hardly.

Q. And as a result of that, you wrote letters to
275 officials, endeavoring to have that removed? A. Yes, sir.

Q. And you tried to get the property owner there to remove those hedges? A. I did not speak to the property owner personally, but I have information that the property owner was spoken to.

Q. Having in mind the two cars which were involved that day, can you remember whether or not those cars could be placed in the category of the ordinary car so far as height is concerned? A. Repeat that question.

Q. Having in mind those two automobiles involved in that accident in 1936, do you remember the height of those cars?

A. No, sir. I don't even remember the cars.

Q. Just one more question, and I am through.

Showing you now plaintiff's exhibit 3-B, will you look at that and tell the Court and jury whether that truly represents the angle of the curve as it was in 1936? A. Well, there seems to be a slight change there, but the main roadbed seems to be the same. The shoulders here (indicating) seem to have been improved over what they were at that time.

Q. By shoulders, you mean the outside of the road? A. Yes, beyond the concrete edge which you see here (indicating).

276 Q. Beyond the white concrete edge? A. Yes, sir.

Q. But in the concrete edge, and the roadbed itself, it is about the same? A. Yes, sir, on the right side. You cannot see the left side.

Q. This picture, as you look on the right, looks toward Conowingo? A. Yes.

Q. Does that truly represent the grade? A. Yes, sir.

Q. Was it about the same in 1936? A. No change, I do not believe.

Q. A very slight grade? A. Yes.

Mr. Offutt: That is all.

The Court: Anything further, Mr. Quinn?

Redirect Examination

By Mr. Quinn:

Q. Officer, what were you referring to when you said the shoulder had been improved on this Exhibit 3-B? A. This section in here (indicating). That was rather rough before; the right-hand side, looking out.

Q. When you put your mark on Exhibit No. 3, you put this mark here (indicating), the second mark? A. Yes, sir.

277 Q. Was that mark designed to be the inner part of the white surface? A. Yes, sir.

Q. You said that you put it there so that you would not mark out a line? A. That is right.

Q. What line were you referring to? A. That is visible in the picture. That appears to be the outer part, or the concrete section.

Q. Of the macadam section, the dark section? A. The concrete section.

Mr. Quinn: That is all.

Mr. Offutt: That is all.

Mr. Quinn: Call Judge Spencer.

Thereupon **Stanley S. Spencer** was produced as a witness on behalf of the defendant; and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Quinn:

Q. Your full name, Judge? A. Stanley S. Spencer.

Mr. Quinn: May Officer Santee be excused?

Mr. Offutt: Yes.

278 By Mr. Quinn:

Q. Are you a member of the bar of the State of Maryland? A. Yes, sir.

Q. And your office is located where? A. In Bel Air, Maryland.

Q. How long have you been a member of the Maryland State Bar? A. Since 1911.

Q. Do you occupy any official position at Bel Air? A. I have been a magistrate there since 1929.

Q. You were then a magistrate in 1936, in October? A. Yes, sir.

Q. Have you brought your official docket with you? A. Yes, sir.

Q. For the period covering October, 1936? A. Yes, sir.

Q. Will you turn to the docket showing the case of William F. Traynor and George Emmert? A. Yes, sir.

Q. They appear on pages 114 and 115 of your docket? A. That is right, book No. 13.

Q. Have you any personal recollection of these cases? A. No, sir, I have not.

Q. Do you have many cases and did you have many
279 during the years 1936 and 1937? A. Well, I have tried on an average of one thousand cases a year, that is, criminal and civil.

Q. Who makes the entries on this docket? A. I did.

Q. Is the docket entry of State of Maryland v. William F. Traynor in your handwriting, outside of the stamped part? A. Yes, sir.

Q. And the same with reference to the State of Maryland against George W. Emmert? A. Yes, sir.

The Court: May I see it?

Mr. Quinn: We offer those docket entries in evidence.

The Court: The jury will be excused for a few minutes, please.

(After the jury had retired:)

The Court: Mr. Quinn, the Court's view is this: If this witness had any personal recollection of the case, he could of course testify that the plaintiff made certain statements indicating his guilt, and pleaded guilty. Now, as I understand it at the moment only, this record is being offered for the purpose of proving negligence in a civil case, by proving a criminal conviction on a plea of guilty. The Court has some doubt whether that is proper evidence in a civil case.

I will be glad to hear you on it.

280 Mr. Quinn: It is not offered for the purpose of proving negligence, if the Court please, except in this way: It is offered—

The Court: I won't say for the purpose of proving negligence, but evidence of it.

Mr. Quinn: Yes. I take it that the ordinary human experience prompts us to say that a man who is innocent is not going to plead guilty.

The Court: I cannot agree with you on that. It has only been a short while ago since I was in Laurel, and the lights were green, and there were fireworks on a Sunday, and when we got through the light we were hauled around to the magistrate's office and all fined three dollars and a half for running through a red light, and in order to get away we paid it, all except one woman, and one woman said "It is just the same gag," and they charge her \$7.50 instead of \$3.50 because of her remark.

Mr. Quinn: It might have been the same old gag, but in that way the judge got \$15 or \$16, while in this case he got \$1.75.

The Court: A plea of guilty under the circumstances of this case would not necessarily mean anything.

Mr. Quinn: But suppose a man gets on the witness stand and he said that "I made a certain turn, and I kept on the right side of the road, I kept entirely within the law
281 and the other fellow cut across the center of the road and he hit me," and then I produce a witness who says "He told me after this accident was over that he was the one who was to blame"—in other words, that he was guilty of reckless driving in that case, certainly that testimony would be admissible to impeach him.

The Court: Yes.

Mr. Quinn: And when he goes into court and pleads guilty, he makes a declaration against interest, and takes a position which is entirely inconsistent with the position he now takes in this court, when he seeks to tell this jury that he was entirely on the right side of the road, that he was not reckless, and I submit that there can be no question but that that is admissible for the purpose of showing that right after this accident he took a position which is entirely inconsistent with his present position.

The fact that the Judge cannot remember—

The Court (interposing): What is your view of that, Mr. Offutt?

Mr. Offutt: I do not think that is the situation here at all.

The Court: The question is whether or not, as I see it—it is not whether or not this is a book of original entry and under the statute it ought to be admitted for that reason; that is not involved here. The question here is
282 whether or not conviction on a plea of guilty in a criminal case is of itself, standing alone, evidence to go to the jury on negligence or contributory negligence on the part of the plaintiff.

That is the question, isn't it?

Mr. Offutt: That is it. If it were an admission against interest, where the man said "I did a certain thing," that would be something else, but here is a blanket plea, and he does not say that he did or did not do a certain thing.

The Court: The Court is inclined to rule with you. The Court only makes this suggestion, that it is a close question, and the case may go to the Court of Appeals, and, if it does, you will be confronted with the Court's ruling.

Mr. Quinn: Pardon me for interrupting, but may I suggest that I intend to follow this up with the testimony of a

witness who was present and does recollect just what the plaintiff stated.

The Court: That, of course, would be evidence.

Mr. Quinn: And I am bringing the whole thing in, to give the Court and jury the benefit of the entire matter.

The Court: I do not think that coupling the other with this helps this any. Of course, the other would be evidence.

Mr. Offutt: I think the other evidence is perfectly all right, but I do not think this is proper evidence. It gets before the jury the effect of a criminal conviction, and even

if your Honor were to admit it in like Mr. Quinn
283 wants you to do, to permit them to read the record in, no matter who much you instructed the jury to disregard the criminal phase of it, they would still consider it and they might hold that against the plaintiff, and I don't think that supports Mr. Quinn's contention.

The Court: Mr. Quinn brought that out on cross-examination, as he had a right to do, not as evidence that the man was guilty, but simply for the purpose of testing the reliability of his evidence. On cross-examination you had a right to do that, undoubtedly, and you did do that, but whether in the face of an objection you have the right to follow it up is another proposition.

Mr. Offutt: In the economy of time, I believe that I can take care of that and if Mr. Quinn wants it in, I will make no objection. I will say, admit it like the other record.

The Court: Call back the jury.

If you settle questions that way, it will relieve the Court of a lot of responsibility.

(After the jury had returned:)

Mr. Quinn: I am only offering the record in one case.

The Court: Yes.

Mr. Quinn (to the jury): Gentlemen, I am now reading the docket entry of the justice of the peace in State of Maryland v. William F. Traynor.

“State of Maryland v. William F. Traynor, 7034, October 17, 1936. Warrant issued to Officer Santee; in-
284 formation on oath of Santee against defendant for reckless driving in Harford County, Maryland, on the 17th day of October, 1936, in violation of Section 194 of the motor vehicle laws of Maryland, Cepi, hearing had, pleads guilty, fined one dollars and costs.”

“Signed Spencer, J. P.”

Q. I think you said that you did not have any independent recollection of this case at all. A. No, sir, I do not.

Q. Would it refresh your recollection if we told you that there was supposed to have been a hearing outside of your office or outside of the building? A. No, it would not. I have on several occasions had hearings outside of my office.

Q. Where a person had been injured, or something? A. One time a person was injured; another time there was some repair work going on in the building, and so much noise there that I could not hold court.

Q. You preside in all cases yourself that are entered on your docket? A. Yes, sir.

Q. Do you ever take a plea from a man who is not in fit mental condition to plead? A. No, sir, I do not. If I considered that a man is not—has not all of his mental
285 capacity, I figure that he is entitled to a postponement until such time that he has, and under those circumstances I either set the amount of collateral or take bond for his appearance, if he is a non-resident of the State of Maryland.

Q. There has been testimony here, Judge Spencer, that when Mr. Traynor was before you, he was in an automobile outside of the building, and that you came out and stated to him, in effect, that if he wanted to plead guilty and pay a fine, he could leave. Do you recall anything about that? A. I don't recall it, sir. It may be true.

Q. What is that? A. It may be true, but I don't recall it.

Q. You don't recall anything about it? A. No, sir.

Mr. Quinn: That is all.

Cross Examination

By Mr. Offutt:

Q. And having in mind, Judge Spencer, that you do not take a plea from a man whose physical condition is such that he is unable to carry on with the trial, and that you would put him on bail and continue it, if you were told that this man had just been returned from the doctor's office, and was suffering a great deal, and wanted to get to Wash-
286 ington to get some medical attention and treatment, would you not, and have you not on previous occa-

sions, permitted the man to pay a nominal amount and forfeit the collateral, and mark it so? A. Yes. I have done that on occasion. I generally look into the facts of the case and probably talk to the officer, and I have taken collateral. If they did not appear, of course it was forfeited. Sometimes I have taken bond, but I will say this, that I don't remember ever having set collateral at \$1.75.

Q. What collateral did you set in that kind of a case? A. In that kind of a case?

Q. Yes. A. I probably would have set—

Q. (interposing) More or less? A. More.

Q. Suppose that the man only had four dollars, how much more would you set it? A. Well, I cannot tell you.

Q. What is your judgment as a judge who has tried a thousand cases a year and has been a judge of this type since 1929? A. Well, it would depend upon the circumstances surrounding that particular case.

Q. Well, are there not there enough of the circumstances to give you some idea, so that you could give the jury the jury the benefit of your opinion based upon your experience? A. I don't know, sir.

Q. Ten dollars? A. Well, I don't know, sir.

Q. How much did you charge in one of the other cases that you are talking about, where the fine was higher? A. Well, I have set—before now I have set ten dollars and costs, twenty-five dollars and costs, one hundred dollars and costs, depending upon the nature of the case.

Q. And ten dollars is probably a minimum, is it not? A. Yes, probably would be.

Q. Judge Spencer, before you took the stand today, did anybody tell you what was claimed to have occurred when this hearing took place, about which you have a notation there? A. It was mentioned to me yesterday, something about that the hearing was supposed to have been taken on the outside of my office, or some place outside of my office.

Q. Was it also explained to you that the man claimed that he was on a stretcher at the time? A. I understood that he was in a police car, and I think Officer Santee told me that, as he remembered it, it was a police car with a stretcher on it.

That was not today. It was yesterday that that was told to me.

Q. You did not have any recollection of it at all?
288 A. No, sir, I do not.

Q. I think you said it could have happened that this was a case where you assessed that sum of money as a nominal sum of money, and let the man go? A. That is possible. I may have realized that the man was injured. I understand it was a rainy day when he made this turn into Broadway, and I know the conditions there, and so forth, and I thought maybe the man had enough trouble and I will give him a minimum fine and let him go.

Q. Without passing on whether he was at fault, or the other man? A. If he wants to plead guilty.

Q. Without passing on the merits of the case? You do that in that type of case? A. Where two people are in an accident and both are charged with reckless driving, and one pleads guilty, I automatically let the other go. Sometimes I take testimony in order to assess the amount of fine I will put on the man.

Q. If you did it in that kind of a case to let the man get into Washington, and charged the nominal amount of \$1.75 as collateral— A. (interposing) It would not be collateral.

Q. If you did that— A. I would not do that.

Q. Didn't you do it? A. Not \$1.75.

289 Q. Wasn't that what you charged here? A. That is in payment of fine and costs when a man pleads guilty. In the State of Maryland, on a charge of reckless driving, the costs are 75 cents where the man pleads guilty, and if he does not plead guilty and the case goes to trial, the costs are \$1.45.

Q. Have you finished? A. Yes.

Q. Judge Spencer, do I understand you correctly when you say you would have charged this man more than \$1.75? A. If he was going to put up bond, I probably would, yes, sir, collateral or bond. Ordinarily when they file a bond, I make it the maximum amount of the fine, and sometimes when they put up collateral and I practically know it will be forfeited, then I probably would assess a fine at what I think is right in the matter. It may be \$10 or \$25 or \$50—I do not know—and costs.

Q. Getting back to this particular case, if this man was lying there on a stretcher in the police car, and he was suffering and wanted to go to Washington, and you learned

that he had only four dollars, would you charge him more than \$1.75? A. Probably would not.

Q. In order to help him to get to Washington? A. I probably would not.

Q. I understood you to say your opinion is that it
290 might have been that kind of a case. A. I do not know, sir.

Q. You don't know whether it was or not? A. No, sir.

Q. I am trying to ask you, based upon your experience—
A. I don't know. I don't remember the circumstances. I told you I don't remember the case.

Q. Let me ask you this. Suppose one man injured and on a stretcher were in front of your office and you had to go out to the car, and, trying to help that man to get away, to be on his way, you let him pay a fine of \$1.75, what would you do with the other man? Would you have a hearing in his case? A. No, sir, I would not. I explained that to you a minute ago.

Q. All right, Judge Spencer. In the case where you let the man pay \$1.75, if your motive was in taking \$1.75 to help him out since he was hurt, and to let him go on his way, would you then go into the merits of the case to determine who of the two drivers was at fault? A. I probably did that, sir.

Q. I am asking you if you would do it to help the man get away for treatment? A. I probably would and if I considered it serious enough enough I would make him furnish some kind of bond for his appearance at a future hearing.

291 Q. If he was a man who was hurt and was willing to get out and forget the matter, what would you do then? A. Of course, I would consider that.

Q. Can't you answer that yes or no? Do you have any interest in the outcome of this case? A. Not a bit in the world.

Mr. Quinn: I submit—

Mr. Offutt: I will ask the jury to disregard that.

The Witness: I never saw either one of the gentlemen before, and never seen them since.

Mr. Quinn: I submit that when counsel offers an affront like that to a man who is a member of the bar in a neighboring state, and a justice of the peace, he ought to apologize to him.

Mr. Offutt: I apologize to him. It was just a slip of the tongue.

The Witness: That is perfectly all right.

Mr. Offutt: I am sure I meant no affront to the witness.

The Court: Now, gentlemen, let us proceed with the case, in view of the fact that that has been settled.

Mr. Offutt: I have no further questions to ask the Judge.

Mr. Quinn: Thank you very much, Judge.

May he be excused?

Mr. Offutt: Yes.

Thereupon **George Emmert** was produced as a witness on behalf of the defendant; and, after being first duly
292 sworn, was examined and testified as follows:

Direct Examination

By Mr. Quinn:

Q. Your name is George Emmert? A. Yes, sir.

Q. How are you employed at the present time? A. Salesman for Coca-Cola Bottling Works.

Q. In making your sales, do you drive a truck? A. Yes, sir.

Q. In October, 1936, how were you employed? A. Nu Car Carriers, Incorporated, as driver.

Q. Do you recall an accident that happened October 17, 1936, on Conowingo Road and Broadway Avenue? A. Yes, sir.

Q. About what time of the morning did that accident happen? A. In the neighborhood of 8 o'clock.

Q. Which way were you traveling? A. Going north.

Q. On what street? A. Broadway.

Q. As you approached the intersection of Conowingo Road, will you tell the jury in your own way just what happened, what you noticed and what you did and what the other fellow did, and all that? A. As I was approach-
293 ing this corner, I knew it to be a dangerous corner, and I was going very slowly, and when I had gotten within 25 or 30 feet of the corner, I noticed this car coming out of Conowingo Road.

Q. By "coming out," what do you mean? A. It was coming—he was headed south, that is, the car intended to come in the opposite direction I was going. The car was going

quite rapidly, I thought, to make a turn, and the driver in his mind was apparently confused; I don't think he knew whether he was going to continue straight or make the turn.

Q. Just tell us what you and he did, not what your impression was. What did he do with his car as he came into view there at the corner? A. He turned the wheel very suddenly to the right. The street was slippery. It had been raining most of the night, and as he did, he slid sideways after the wheels, the front wheels, seemed to almost set still, and the car pivoted on that and swung right around and came into the front of my truck.

Q. What did you do when you saw him first start to skid? A. I applied the brakes and got right up against the curb.

Q. Where were you driving with reference to the curb when he first came in sight? How close were you? A. I was only probably from a foot to two foot away from
294 the curb.

Q. Describe this machine you were operating, tractor and trailer. A. It is known as a skeleton trailer; that is really all it is. It has a framework of steel that the cars rode on. One car goes over the top, one down in back, and one car rides on a short trailer.

Q. What is the tractor part? How is that made? A. There is not any body on it. There is only two runways that go to the back, in the lower part, and two runways over the top.

Q. No cab to it? A. No cab to it.

Q. Is there any cab? A. Excepting the cab that you ride in.

Q. With reference to the front of it, is there any framework that runs out toward the bumper, and toward the radiator? A. Up high above the cab there are two arms, like this, that the car sets in. Then there are two braces that run down to the bumper and on the front of the truck. There is a support—

Q. You can detach the tractor from the trailer, can't you? A. Yes.

295 Q. How long is the tractor? A. I don't know exactly.

Q. Can you give us any idea? 6 feet or 7 feet? A. The tractor, overall, would be about 14 to 16 feet.

Q. That is the tractor part, outside of the trailer? A. Yes, sir.

Q. How long is the trailer? A. It is a little shorter than that. It only carries one car.

Q. This trailer you had only carried one car? A. Yes, sir, and two cars were carried on the tractor.

By the Court:

Q. Was it loaded or unloaded? A. Unloaded.

By Mr. Quinn:

Q. You were on the way from where? A. From Hagerstown.

Q. Going to where? A. Chester, Pennsylvania.

Q. Has the Nu Car Carriers a branch at Chester? A. Yes, sir.

Q. And a shop there? A. Yes, sir.

Q. This (illustrating at the blackboard) is Conowingo Road, coming down here, and this (indicating) is the
296 inner part of Conowingo Road, and this is supposed to be the center line of the road coming around here and into Broadway, and this is the outer part of Conowingo Road going up Broadway here (indicating in each instance).

This is the car that Mr. Traynor was operating. Take this as being the corner here, where you were coming around the curve, and indicate to us just where you were operating your car and, when you saw this other car, just what it did.

Now, this is the curb line of Broadway over here, and this is supposed to be the center line, and this is your tractor-trailer and there is the other car (indicating in each case). Show us just what happened. A. I was proceeding this way (indicating), and this car was coming in this direction (indicating). When he got here, about here (indicating), he turned the wheel very suddenly to make a right-hand turn. The street was wet. Of course, by that time I appreciate he was a little further; the car then began to go in this way, and came in contact with me like this (indicating).

Q. Was that just the way they hit? A. Yes, sir.

Q. About how far do you think you were from the imaginary line across here on this turn (indicating) when that car came into you that way? A. About 15 to 20 feet.

297 Q. About 15 or 20 feet back from the intersection?

A. Yes, sir.

Q. What did you do when you saw him, as you say, skidding around like that? A. Just went—I had only a short ways—went right into the curb and stopped. I was traveling about 12 to 15 miles an hour.

Q. I think you said you were traveling close to the curb before this car came in sight. A. Yes, sir.

Q. And then when you saw him you pulled in right against the curb? A. Yes, sir.

Q. Were you at a standstill when he crashed? A. My truck was completely stopped.

Q. Did you at any time after the crash move your truck before the officers came there? A. No, sir.

Q. Was it moved after the officers came? A. Yes, sir, it was.

Q. Who moved it, and how did you move it? A. We moved it around to this side, this little side here (indicating) that went this way, to get it out of traffic.

Q. That is the little road that goes up that way
298 (indicating)? A. Yes, sir.

Q. How did you move it around? Operate it on its own power? A. I think we pushed it around.

Q. By the way, did you operate that tractor afterwards under its own power? A. No, sir, I don't think so.

Q. How did you get to Chester? A. I went back up on the other trailer that came down to take this one in.

Q. Did you send word to Chester of the accident? A. Yes, sir, I called up.

Q. And they sent another trailer down? A. Yes, sir.

Q. What did they do with your trailer? A. They unhooked the trailer from my tractor and attached that to the good tractor, loaded the damaged tractor onto this trailer and conveyed it.

Q. In other words, you took the horse and put it into the cart? A. That is right.

Q. And then you went to Chester? A. That is right.

Q. What position were the cars in right after the accident? You told how he swung around there. A. He
299 swung around and went into the front of the truck and bounced back, oh, a foot or two foot away from it, and went into the truck like that (indicating).

Q. Were the cars in that position when the officer arrived? A. Yes.

Q. Was that Officer Santee? A. Yes, sir.

Q. After that, did you go any place? A. Immediately following the accident?

Q. Yes, after the officer arrived. A. Yes, sir. We got in the police car and went to a doctor's office.

Q. First of all, how long was it after the collision took place that Officer Santee came to the scene? A. A very short while. I don't know how long.

Q. Was it five or ten minutes? A. Perhaps fifteen minutes.

Q. Did you see Mr. Traynor in the meantime, or talk to him or his son, the people who were in the other car? A. I saw them, yes, sir, and tried to help them out of the car.

Q. Did they get out of the car? Did Mr. Traynor get out of the car, or did you help him out? A. I think—it seems they waited. They got the car there to take
300 him away. He did not feel like walking.

Q. Is that the police officer's car? A. Yes, sir.

Q. I think you said that then you went to the doctor's office. Did you go there? A. Yes, sir.

Q. With the officer and Mr. Traynor and his son? A. Yes, sir.

Q. Were you there when the doctor examined Mr. Traynor? A. In the same room.

Q. Did you see him examine him? A. Yes, sir.

Q. After he made the examination, what happened? A. We got back in the police car and went down another street, and the officer parked and got out of the car and came back in a little while with Judge Spencer.

Q. What happened after Judge Spencer got there? A. He asked questions; a few questions.

Q. Did he ask you how the accident happened? A. Yes, sir.

Q. Did you tell him? A. Yes, sir.

Q. Did you tell him it had happened just the way you have described here? A. Yes, sir.

301 Mr. Offutt: I object.

The Court: Objection sustained.

Mr. Quinn: Probably that was a little leading.

The Court: Unless what he told him was in the presence of the plaintiff, it would not be admissible.

By Mr. Quinn:

Q. Was the plaintiff there at that time when Judge Spencer asked about how the accident happened—Mr. Traynor?

A. Yes, sir. We were all in the car.

Q. All in the police car? A. Yes, sir.

Q. Were you all in there when Judge Spencer asked you the questions? A. Yes, sir.

Q. Did he ask Mr. Traynor anything about the accident, and how it happened? A. I remember that he did ask him.

Q. What did he ask him and what did Mr. Traynor reply? A. The only outstanding thing I can remember was that he told him that if the street had not been wet, he could have made that turn.

Q. Mr. Traynor told the judge that if the street had not been wet, he could have made that turn? A. Yes, sir.

Q. What did Mr. Traynor do after telling the judge
302 that? A. I don't know in particular.

Q. Do you recall his paying any money, or anyone paying any money? A. I think he asked somebody to get some money out of his back pocket, his billfold.

Q. Did Mr. Traynor at that time before the justice of the peace blame you in any way for the accident? A. No, sir.

Q. After they got the money, did you go with the officer and Mr. Traynor and his son any place else? A. No, sir.

Q. Did you go back to the scene of the accident? A. After I was released, I went back with the truck.

Q. You went back to the truck? A. Yes, sir.

Q. Did the officer go back there? A. I don't remember whether he did or not.

Q. Mr. Emmert, after the justice of the peace got through and the money had been paid, did you get Mr. Traynor to sign any paper for you? A. Yes, sir.

Mr. Fonbuena: I wish Mr. Quinn would not lead the witness too much. I think that he has been leading the witness.

The Court: Well, now, the question would be, did or did not Mr. Traynor sign a paper.

303 Would that be satisfactory to you?

Mr. Quinn: Yes, your Honor.

Q. Did Mr. Traynor sign a paper for you? A. Yes, sir.

Q. Do you remember what kind of a paper it was? A. Yes, sir.

Q. What was at the top of the paper? A. Exoneration blank.

Mr. Fonbuena: Before he shows him anything, I think he should describe this paper a little more in detail; before Mr. Quinn shows him anything, I believe the witness should testify and show what was signed.

By Mr. Quinn:

Q. What kind of a paper was it?

The Court: First he said it was what was known as an exoneration paper. He had gotten that far. Now proceed.

By Mr. Quinn:

Q. Describe the paper, just the size of it and what was on it, as far as you can remember. A. It was a paper about the size of the cover of a book.

The Court: He cannot tell what is on it until he first explains the absence of the paper.

Mr. Quinn: Well, I can only take him step by step on it, but I can give your Honor my assurance—

The Court (interposing): You propose to follow
304 this up and show that the paper cannot be produced?
Is that the idea?

Mr. Quinn: Yes.

The Court: Proceed, with that assurance.

By Mr. Quinn:

Q. Will you describe the size of the paper? A. It is a piece of paper a little larger all around than the cover of this (indicating).

Q. The cover of the Bible? A. Yes.

Q. Was it paper, not cardboard or heavy paper? A. It was a heavy grade of paper.

Q. Do you remember what was on the top of the paper? A. "Exoneration Form" or "Exoneration Blank." I don't know exactly which one.

Q. Do you remember what was in the paper, the words, in substance what was in the paper? A. Yes, sir. I cannot word it like it was on the page, but it exonerates the driver—

Mr. Offutt: I object to that.

The Court: I think that the word "exonerates" is a conclusion. I think he said what was on the paper, as far as he can.

Mr. Quinn: The only difficulty is that that is just the word that was used.

The Court: He has already said that it was an ex-
305 oneration paper. I don't know whether he carries them around in his pocket or not.

By Mr. Quinn:

Q. What about these exoneration forms that you are talking about? Did the men carry them on their trucks? A. Yes, sir.

Q. On this particular day, did you have any in your truck? A. No, sir.

Q. Where did you get this paper that you got for Mr. Traynor to sign? A. From another driver down the road.

Q. What company did he drive for? A. Anchor.

Q. Did you know the man's name? A. Yes, sir.

Q. Do you know where he is at the present time? A. Last I heard, in Baltimore.

Q. What is his name? A. McLachlen.

Q. And he was driving for the Anchor people? A. Yes, sir.

Q. Did you get a blank from him? A. Yes, sir.

Q. Was that blank in printing? Was it printed
306 words with certain little blanks for you to fill in? A. Yes, sir.

Q. Is that the form you used to get Mr. Traynor to sign? A. Yes, sir.

Q. What did that form say as to you? A. It said that it exonerated me from any blame in connection with the accident. I don't know how to word it; what it meant was that it relieved me of responsibility.

The Court: You cannot state that.

By Mr. Quinn:

Q. What is the substance of it? You said it exonerated you from blame for the accident? Is that right? A. Yes.

Q. Did Mr. Traynor sign that? A. Yes.

Q. Where was he when he signed it? A. Still in the police car.

Q. Had the justice of the peace concluded his proceedings there? A. Yes.

Q. Had he paid his fine? A. Yes, sir.

Q. What did he sign it with, pen or pencil? A. Pencil.

Q. Did he raise any objection to signing it at all?
307 A. No, sir.

Q. Was his son there at the time? A. Yes, sir.

Q. Seated in the car? A. Yes, sir.

Q. What did you do with that paper then? A. I turned it in with my accident report in Chester.

Q. Did you send word to Chester about this accident right after it happened? A. Yes, sir.

Q. How did you send word? A. By telephone.

Q. Then somebody came down from Chester to meet your tractor and trailer, as you have described it? A. Yes, sir.

Q. How long after the accident did you arrive in Chester?
A. Perhaps two hours or more.

Q. Then, this exoneration form, what did you do with it?
A. I turned that in to Mr. Westcott, who took my report of the accident.

By the Court:

Q. Who is Mr. Westcott? A. He was at that time assistant service manager.

By Mr. Quinn:

308 Q. Is Mr. Westcott here in court today? A. Yes, sir.

Q. You turned it in to him? A. Yes, sir.

Q. Have you seen the original of that report since you turned it in, that exoneration form and the report? A. No, sir.

Q. Describe to the jury just what the damage was to your tractor after this collision. A. The superstructure—there is two rods that go up—were broken and bent. The radiator was mashed in across the generator; broke the intake manifold, the two headlights, and the front fenders, and I think the bumper was bent a little.

Q. This damage to—what did you say it was? Intake manifold and generator? A. Yes, sir, it is mounted on the intake manifold.

Q. What would be the effect of that damage to that on your ability to operate the motor and start the motor of that tractor? A. You would not be able to, because it would draw in only air instead of gasoline.

Q. Did you at any time after this collision move your tractor or trailer outside of the time you say you pushed it around the corner? A. No, sir.

Q. Was there much damage to the front of the car?
309 You spoke of both headlights being damaged. A.
Yes, sir.

Q. Were they bent? A. They were broken; the glass was broken, and the light bent.

Q. How far back was the radiator pushed? A. About 6 inches.

Q. Was that damage to the front of the car, the radiator, all the way across the front, or just at one side? A. All the way across the front.

Q. Was the tractor taken to the shop at Chester? A. Yes, sir.

Q. And turned in to the shop when you took it up on the trailer? A. Yes, sir.

Q. Who was the police officer that came to the scene? A. Officer Santee.

Q. Is that the gentleman who was here in the Court House just now? A. Yes, sir.

Q. What was the condition of Mr. Traynor at the time that he was before the justice of the peace or outside of the justice of the peace's office when he told the justice of the peace that he could have made that curve if the road
310 had not been wet? A. Well, he appeared uncomfortable, but otherwise he did not seem to be so badly hurt.

Q. How did he indicate he was uncomfortable? A. By just moving around. He said his arm hurt, or side hurt, or something.

Q. Did he seem to understand everything that was going on? A. Yes, sir.

Q. Did he speak plainly when he told the justice of the peace how the accident happened? A. Yes, sir.

The Court: That is leading him too much, Mr. Quinn. Of course, I think I want to control it to some extent, and I do not think you want to lead him too much. He is an interested party.

By Mr. Quinn:

Q. I think you said you are working for the Coca-Cola people at the present time. A. Yes, sir.

Q. How long have you been working for them? A. Nearly three years.

Q. You went to work for them how long after this accident? A. Two weeks.

Mr. Quinn: You may examine.

311 Cross Examination

By Mr. Offutt:

Q. When you went up to get this trailer truck, you left Alexandria, Virginia, didn't you? A. Yes, sir.

Q. And that trailer truck had been going to Hagerstown, and had been broken down? Isn't that right? A. Yes, sir.

Q. And you left it in Hagerstown to be repaired? A. Yes.

Q. So you left on the early morning, did you? When did you leave Alexandria to go get the truck? A. I left on the morning of the day before.

Q. Early in the morning? A. It was not early. I did not get away early.

Q. When you got to Hagerstown, the object was to carry this trailer truck, the tractor and the trailer, over to Chester? A. Yes, sir.

Q. The truck in the meantime had been repaired? A. Yes, sir.

Q. Did you stop to sleep anywhere? A. Yes, sir.

Q. What time did you get up after you stopped to sleep?

A. About 5 o'clock; 4:30 or 5 o'clock.

312 Q. How long had you slept? A. Slept for about five hours.

Q. Where were you when you got up? A. Frederick.

By the Court:

Q. Where did you sleep? A. In Frederick.

By Mr. Offutt:

Q. Did you sleep in the trailer, or in some place? A. In the gas station.

Q. When you started, it was raining? Is that correct? A. That is right.

Q. Did you drive to Baltimore, from Frederick to Baltimore first? A. Yes.

Q. And then from Baltimore you were going through Bel Air and on up to Chester? A. Yes, sir.

Q. So, when you got into Bel Air, what was the speed limit there? A. I really don't know.

Q. Don't you know what it was? A. I don't know the speed limit in Bel Air.

Q. How fast were you going between Baltimore and Bel Air? What is the highest speed you attained? A. 20 to 25 miles an hour. The truck had been repaired.
313 I could not drive it faster.

Q. What time did you say you left Frederick? A. I left Frederick, I think, somewhere around 4:30 to 5.

Q. How far is Frederick from Baltimore? A. Around 40 miles, I think.

Q. And how far is Bel Air from Baltimore? A. I am not positive. I think it is around 18 or 20.

Q. Isn't it about 25 or 28? A. Possibly. I am not familiar——

Q. (interposing) Did you stop to have breakfast in Baltimore? A. No.

Q. Hadn't you had anything to eat yet? A. I had not made any stops.

Q. Did you make any stops from Frederick to the time that the accident happened? A. Not that I recall.

Q. You never drove over 20 miles an hour? A. 20 to 25; no faster than 25.

Q. When you came to Bel Air, you did not need to step down the speed? A. I did. I know that you cannot go through Bel Air that fast, 25 miles an hour, not with a truck.

Q. You say that you were going 20 to 25. Were
314 you going 20 miles an hour when you came through Bel Air? A. No, sir, not that fast.

Q. How fast were you going? A. Around 15 miles an hour.

By the Court:

Q. How far was it from the front of the car that you were driving to the back of the trailer, the extreme end of the trailer? What is the total length from your lamps in front to the tail end? A. 20 some feet. I don't know exactly.

By Mr. Offutt:

Q. Had you driven this road before? A. Yes, sir.

Q. How many times had you driven it, about? A. Over a period of two years, I drove it quite frequently.

Q. You were familiar with this intersection where the collision occurred? A. Yes, sir.

Q. Did you notice the sign just as you approached the intersection, which said "Dangerous Intersection"? A. Yes, sir.

Q. Were you going 15 miles an hour when you saw that? A. I don't think I was going 15 at that time; from 10 to 15.

315 Q. Was there any reason why you would slow down your speed before you saw that sign? A. I knew the intersection to be a bad one.

Q. Did you slow down your speed because you knew that? A. I knew that that intersection was very dangerous, and I slowed down very slow in order to see what was coming. I was blinded on the other side.

Q. That sign is about 70 yards from the intersection, isn't it? A. I don't recall how far it is.

Q. You don't recall it? A. I don't recall how far it would be.

Q. I show you plaintiff's exhibit 3-A and ask you to take a look at it. Is that the sign that you saw, with "Dangerous Intersection" on it? A. Yes.

Q. Can you see the intersection from there, from the sign? A. It is not so clear. I would not want to swear that that is the intersection. It looks like it, but that picture is not clear enough.

Q. There is a sign like that before you get to the intersection? A. There are signs like that all over.

Q. But there is a sign like that before you get to
316 the intersection? A. As far as I know, there is. I have seen the signs there.

Q. How fast were you going when you saw this sign that said "Dangerous Intersection"? A. At the same speed, above 15 miles an hour.

Q. You were going 15 miles an hour? A. Probably a little faster than that.

Q. How far were you from the intersection itself when you saw this other car? A. 25 to 30 feet.

Q. What was your speed then? A. From 10 to 15. I was slowing down all the time.

Q. How long was the trailer as compared with the truck—tractor? A. It is, I think, a little shorter over-all.

Q. How long? A. I don't know the exact length of those things.

Q. Would you say the trailer is one-third the length of the tractor? A. No, it is longer than that. You could say it is of even length; it would be pretty close, but I think it is a little shorter.

Q. Is it a fair estimate to say that the tractor is 25 feet and the trailer 25 feet long? A. No, that would be 50 feet. It is only some 20 feet long.

The Court: The tractor and trailer both, he said, were only 20 feet.

The Witness: 20 some feet.

By Mr. Offutt:

Q. On the tractor, there is one car over the top of the tractor, or two cars? A. One car over the cab and one in back.

Q. Wasn't that the type of car that carries two cars on top of the tractor? A. It carries two cars on the tractor, one up over the top and one behind the cab.

Q. Can you show us something in this room that in your judgment is the length of that tractor and trailer?

The Court: You mean, from the lamps back to the back part of the trailer?

Mr. Offutt: From the lamps back to the back part of the trailer; and show us the length of that vehicle.

A. I would imagine it would be from here, the corner of this partition, to about the back of that first seat, over-all length. That is approximate, mind.

By the Court:

Q. Is it more than 20 feet?

Mr. Quinn: What do you mean by "first seat"?
318 A. The first seat.

By Mr. Offutt:

Q. This seat right here (indicating).

The Court: That looks just about right.

The Witness: From the end of this partition (indicating). I cannot judge the distance.

By Mr. Offutt:

Q. Right where this gentleman (indicating) has his hand?
A. I would say that would be approximate.

Q. How far was the car that you saw, when you were 30 or 35 feet— A. When I first saw him, I was 25 to 30 feet beyond the curve.

Q. Where was the other car at that time? A. He was coming into the intersection.

Q. What part of the intersection? Will you step down here and show us on this diagram? Stand aside, and indicate on here with a cross mark, where the front end of the other car was when you were 25 or 30 feet from the intersection. This (indicating) is Broadway, and this (indicating) is Conowingo.

(The witness did as requested.)

By Mr. Quinn:

Q. What was that mark that you put up there? A. This is approximately to indicate where—the approximate position where I was.

319 Mr. Quinn: Put a little heavier mark.

By Mr. Offutt:

Q. Make a mark where the other car was when you were about there. A. About here (indicating).

Q. If this (indicating) is the center of the road, would you leave the mark where it is now? A. He was right pretty close to the middle of the road.

Q. Is that the first time you saw it, as indicated by you now? A. Yes, sir.

Q. Then what did you do? A. I could see that something was going to happen, because that car was going too fast to negotiate the turn.

Q. What did you do? A. Applied my brakes and went right to the curb.

Q. Did you put on your brakes quickly? A. They are power brakes. You touch them, and they are on.

Q. And your car was going 15 miles an hour then? A. Less than that at that time.

Q. When did you slacken up your speed? A. I came past this sign at 15, and I was slowing down all the time. So I was going between 10 and 15 miles an hour.

Q. When you first saw him? A. Yes.

320 Q. Was the road wet? A. The road was wet.

Q. How quickly did your car stop? A. Almost immediately.

Q. How far did it go? A. Very few feet.

Q. How many? A. I cannot tell exactly.

Q. Your best judgment? A. Very few. It don't take long to stop.

Q. Show us some distance in this room that your car went after you applied the brakes while going 10 to 15 miles an hour. A. The car could not have been—the trailer could not have gone more than 10 feet at the most.

Q. How about the front part of the tractor? A. We speak of it as a unit, the trailer.

Q. And your car did not go more than 10 feet after you applied your brakes? A. Hardly more than that.

Q. When you first saw the other car, what was it doing? A. He was approaching it, and looked this way and that way, and finally turned the wheel and he got about to here (indicating), trying to make a turn.

321 Q. Put a mark where you say he was trying to make a turn. Make both those marks heavy.

(The witness did as requested.)

Q. That second mark you just made heavy, is that when he pulled the wheel and was trying to make the turn? A. Yes.

Q. How much distance was there between the first mark you made, and that mark (indicating), as you remember it, on that day? A. The car had traveled about half the distance of the intersection.

Q. Can you give us some estimate in feet of how far that car went between those two points? A. Approximately 15 feet.

Q. Between those two marks, a distance of approximately 15 feet. Did the car make any kind of a turn? A. It appeared he was going—

Q. (interposing) Can you answer that yes or no? Did it make a turn or not? A. He could not turn in 15 feet, if I understand the question.

Q. You testified that the car went between those two points a distance of 15 feet, and when it reached the second point you saw the driver looking to the right and left, and he pulled the wheel. Between those two points, until

322 he reached the point when he pulled the wheel, did the car make any kind of a turn? A. It started straight, and then turned sharp to the right.

Q. Did it make the turn to the right when it reached this point (indicating)? A. Right here (indicating).

Q. Between these two points (indicating), it made no turn? A. Going straight.

Q. Is that correct? A. That is the way I would explain it.

Q. Well, you have explained that from here to here (indicating) it went straight. A. I am undecided—

Q. (continuing) Did it make any kind of a turn between those two points? A. It could not turn in 15 feet. I don't understand that question. It is impossible.

Q. I am not asking you whether it is possible. I am asking you what you said you saw it do that day. A. The car came down here (indicating), when I first saw it, and it came out into the intersection and started along straight ahead and then pulled the wheel around suddenly, the best that I can explain it.

323 Q. How far was it out in the intersection before he pulled the wheel around to make the turn? A. Almost half way—about half way through the intersection, and suddenly decided to make a turn.

Q. Make a cross mark where the car was when he decided to make the turn.

Mr. Quinn: I submit that he has already done it.

The Court: He can make it. He is under cross-examination.

The Witness: Here (indicating) is where he attempted to make the turn.

The Court: The Court and jury understand that plaintiff's car did not begin to make a turn until it was about in the middle of the intersection and also in about the middle of the turn, that is, about half way between the right and the left side of the road. Is that right?

Mr. Offutt: Did you hear what his Honor said?

The Court: I want the witness to take his time, and explain just what he means.

Mr. Offutt: That is just what I want.

By the Court:

Q. Was the plaintiff, from your testimony, about half way between the right and the left side of the road, and also about half way through the intersection, before he started

to make a turn? Is that your judgment about it? A.
324 That is about it, yes, sir. I thought he was going
straight for a moment, straight across, and then, as
he neared the center, very nearly the center of the intersec-
tion, he turned the wheel sharply to the right.

By Mr. Offutt:

Q. Until you saw him turn and start to the right, you did
not observe anything there that would make you stop? A.
Certainly; the car coming in that way, I naturally stopped.

Q. You thought he was going straight through? A. For
a second I did, yes.

Q. Until the car did other than go straight through, you
had no reason to stop? A. Say that again.

Q. Until you saw the car try to make a turn, you had
no reason to stop? Isn't that correct? A. To my mind, I
thought the man was bewildered. I didn't know what would
happen. I thought the best thing to do was to stop.

The Court: The testimony will be resumed tomorrow
morning.

Between now and tomorrow morning at 10 o'clock, when
you take the stand again, you are not to talk about this
case with anybody—understand?

The Witness: Yes, sir.

The Court: That is all I want to say to you. You
325 can step down.

(To the jury) Gentlemen of the jury, when a case
is short, very often the Court does not make any statement
to the jury about what their attitude should be about dis-
cussing the case, because it might put something in their
minds that otherwise would not be there; but this case has
now taken a day and a half and it is about to take another
day, and the Court thinks that it should call your attention
to the fact that it is a good deal better—of course, it is
the rule, but, in addition, it is a good deal better not to dis-
cuss the case with anybody, not even among yourselves,
for this reason, that if you don't talk about it at all, then
you have nothing to take back among yourselves, and the
best thing to do is just not to discuss it among yourselves
until you go to the jury room, and that is not only the best
thing, but it is the rule of the court also.

Now, gentlemen, we will adjourn until tomorrow morning
at 10 o'clock.

(Thereupon, at 4:17 o'clock p.m., an adjournment was taken until Wednesday morning, October 25, 1939, at 10 o'clock.)

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Washington, D. C.

Wednesday, October 25, 1939.

Hearing in the above-entitled cause was resumed before Mr. Justice Goldsborough and a jury at 10 o'clock a. m.

Appearances:

D. K. Offutt, Esq., and E. N. Fonbuena, Esq., for the plaintiff.

Henry I Quinn, Esq., and Richard W. Galiher, Esq., for the defendant.

Proceedings

The Court: Proceed.

Thereupon **George Emmert** the witness on the stand at the time of the taking of an adjournment on the evening before, resumed for

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Further Cross Examination

By Mr. Offutt:

Q. Mr. Emmert, when we suspended yesterday we were talking about the distance which you observed the other car travel after you first saw it, which you indicating from here to here (indicating) before it made a turn or attempted to make a turn to the right. I believe you testified yesterday that the other car was right at this mark (indicating) when you first saw it—is that correct? A. That is right.

Q. And that it went from there to where you put this heavy cross mark before the wheels were turned and it started to make a turn into Broadway Avenue—is that correct? A. Yes, sir.

Q. And you estimated that distance as 15 feet, approximately. A. Yes.

Q. Did you at any time approximate the speed at which the car was traveling before it crashed into your car? A. The car was going at a pretty good rate. I would not know

what speed it was going. There was not time to judge it.

Q. Did you at one time estimate that speed at 30 miles an hour? A. I would say he was going that fast, 328 yes.

By the Court:

Q. When you were facing the car, you were going one way and the car the other, and you only saw it for 15 feet, you are able to estimate its speed? A. Not definitely, no, sir. I thought it was going at a good rate of speed.

By Mr. Offutt:

Q. When you first saw the car at this point (indicating) you were back about where this mark is? Isn't that correct? Do you see this mark here? A. Yes, sir.

Q. You said it was 25 or 30 feet from the corner. A. Yes, sir.

Q. And at that time you applied your brakes to stop? Is that correct? A. That is right.

Q. That is, when you first saw the car right here (indicating), that you applied your brakes? A. Yes, sir.

Q. You did not wait until you saw the point where the heavy marks are when you applied the brakes? A. No, sir. As soon as I saw the car approach, I applied the brakes.

Q. You are sure of that? A. Yes.

329 Q. And from that time until you saw it start to turn here (indicating), it was going practically in a straight line, wasn't it? A. Between those two points?

Q. Yes. A. Practically, yes, sir.

Q. This road is practically straight, isn't it? A. As Well as I can remember, it is, for a distance back, almost straight.

Q. And then this road from about here up to here (indicating) is straight, all the way up Broadway Avenue? A. Yes, sir.

Q. Isn't there a slight downgrade as you go into this intersection down Broadway Avenue? A. I noticed it to be flat.

Q. Perfectly flat? A. There may have been a degree—if it was one way or the other, a trifle. I could not notice that.

Q. How about this part here (indicating)? Is that part about the same as this part here (indicating) as to grade,

practically level? A. No, sir. You come up over a knoll and drop approaching that intersection.

Q. How far back is the knoll from this intersection? A. I don't know exactly; just a rise.

Q. The rise is about 100 yards back? A. I don't think it is that far. It could possibly be, but I don't think so.

Q. 75 yards? A. I cannot judge a distance like that.

The Court: Has anybody measured since yesterday the distance from the end of this rail here to the top of the front bench?

Mr. Offutt: No. I tried to get Mr. Quinn to do it, but after we suspended—

Mr. Quinn: Tried to get me to do it?

The Court: If the witness' idea of distance is—if he is not able to estimate distance any better than yesterday, I do not see that his testimony as to distances is of much benefit because I do not know how far it is—I should think it was nearer 40 feet than 20.

Mr. Offutt: Can we step it off now?

Mr. Quinn: Go ahead and step it off.

(After Mr. Offutt had stepped it off:)

Mr. Offutt: May we agree that that is 30 feet?

Mr. Quinn: No, not the way you stepped it. You took football strides, not ordinary ones.

The Court: It is a matter of some importance—the length of the truck and trailer is of some importance, and somebody ought to take a tape or a rule and measure it. It is a simple matter for anybody that can measure at all, of one or two minutes.

Mr. Offutt: We have a yardstick.

The Court: Why don't you use it, and get it over with?

Mr. Offutt (after measuring): 31 feet.

Mr. Quinn: That is, to the back of the bench?

Mr. Offutt: To the back of the bench.

The Court: That is what he said, to the top of the bench.

Mr. Offutt: 31 feet.

The Court: Proceed.

Mr. Quinn: And the witness said it was 20 some feet. He did not say it was 20 feet.

The Court: I don't know about that.

Mr. Offutt: He said 22 feet.

Mr. Quinn: He did not. He said 20 some feet, and it was repeated when his Honor asked the question.

The Court: The criticism of the Court is not that he was not trying to do the best he could. It was only that it appeared that his idea of distances was not accurate.

Mr. Quinn: I did not want to make any objection at the time your Honor made the comment, but I respectfully submit that it is prejudicial to the defendant when your Honor made the comment that, from what he testified to yesterday, his estimate as to distance was not worth very much.

When a man says that—

332 The Court: I don't think it was prejudicial at all.

I understood yesterday, as near as I could tell, that he meant 20 feet. He may have said 20 some—I don't know.

Mr. Quinn: We will have the reporter go back and read his notes.

The Court: But if you think it is of sufficient importance, of course the reporter can go back.

(After a few moments:)

The Court: Proceed.

By Mr. Offutt:

Q. Mr. Emmert, having in mind these two points which you just referred to here (indicating), and which you marked yesterday, this first and second mark, will you indicate some point in this courtroom which is the distance that you base that approximation of 15 feet upon, two points which show that distance? For instance, from where you are now, you were looking in that direction (indicating) when you saw that car? A. Yes, sir.

Q. Will you point from this wall, over in this direction (indicating), how far the car traveled—but before you do so, may I ask you this question: Isn't that approximately the way the car was appearing to you as you were coming down? A. That is correct.

Q. Coming at an angle, from this wall (indicat-
333 ing)? A. That is right.

Q. All right. A. I would say about from the wall to somewhere about the middle of that aisle or to the end of this partition (indicating), I suppose it would be. That appears to be about it.

By the Court:

Q. From the wall on that side? A. From the wall on that side (indicating).

Q. To the end of the bench? A. Yes, sir, to the end of it, where you have your finger.

By Mr. Quinn:

Q. Is this (indicating) what you mean, son? A. Yes, sir.

Q. From that wall over here (indicating)? A. Yes, sir.

Mr. Quinn: As approximately 15 feet.

By Mr. Offutt:

Q. That was a sharp turn at this corner, was it not? A. It was quite sharp.

Q. And the car which you said started to skid had not diminished its speed any from the time you first saw it until it first started to skid? A. No, sir, there was no time to.

Q. After the car skidded, did the car start to skid
334 from the time which you have marked, right on here
(indicating)? A. That is the point that the wheels
were turned.

Q. Did the car begin to skid when the wheels were turned?
A. They did not take hold immediately on the ground;
probably a few feet, and then they began to pivot on the
front wheels.

Q. When the wheels did not take hold as the wheels were
turned, the car was skidding in the meantime, was it not?
A. It begin to skid after the wheels were turned. The front
wheels did not take hold immediately, but the front wheels
begin to hold and the rear begin to follow around.

Q. When you say the front wheels did not take hold im-
mediately, you mean the car was skidding? A. Yes, sir, it
continued on an angle.

Q. How far did the car go before the front wheels took
hold after they were turned? A. Just a very short way.

Q. Tell us how far. A. Just a few feet.

Q. Show us something in this room that indicates the dis-
tance the car went before the wheels took hold. A. I say
4 or 5 feet.

Q. Show us something in here that is 4 or 5 feet, in your
judgment.

335 Let us do it this way: You estimated that this (indicating) was the point where the wheels were turning, from this wall to here (indicating), as you were looking at the car down the road. A. That is right.

Q. At what point did the car go before the wheels took hold? A. About the distance between those two ends (indicating).

Q. Here (indicating)? A. Yes, sir.

Q. When the wheels took hold, could you see the car still going in this same direction? A. It pivoted on the front wheels, and the rear end swung around.

Q. That is after the wheels took hold, wasn't it? A. It was in that course—let me explain it to you.

Q. Did the car begin to pivot before it reached this point here (indicating)? A. It had taken an angle toward that direction, and the minute the front wheels grabbed, the rear began to swing around. It had perhaps started in an angle.

Q. As you saw it, did the car begin to swing around until it reached this point (indicating), when the front wheels took hold?

336 Let us put it this way: You did not know that the front wheels had taken hold until it began to pivot? A. It yanked this way (indicating), and it took the angle of the front wheels pushing forward instead of rolling, and that thing happened so fast that you do not have time to make a thorough picture of it, you know.

Q. You are describing it. I did not see it. I want you to tell us what you saw take place.

When you spoke of pivoting, you mean the car started to change course? A. The front wheels, after they had seemed to grab in the road, almost came to a stop with the rear end of the car pivoting around.

Q. Is that approximately the way (indicating) the car was when you first saw it? A. You are assuming that these lines are the curb lines?

Q. Yes. Have you a piece of chalk? We will make a center line.

Your car was over about like that (indicating)? A. Approximately.

Q. Further back up here (indicating)? A. At what point?

Q. When this car was first seen by you. A. Yes, sir.

Q. Place the small Ford where it was when you first saw it. A. Here (indicating).

Q. Over the line? A. Approximately there (indicating).

Q. Was it over the center line? A. There was no line on the street.

Q. Are you positive of that? A. There was no line on the curve.

By the Court:

Q. Was it over the center of the street? A. It was in the center of the street, yes.

By Mr. Offutt:

Q. Was it over the center or the right-hand side of the center? A. I would say probably a little to the right of the center, but it was right in the center of the road, near the center of the road.

Q. But a little to the right of the center? A. I think so.

Q. Since this white line indicates the center of the road, would it be fair to move it to the right of the center? A. I think part of the car was occupying the center.

Q. That (indicating) is approximately the position when you first saw the car? A. Approximately, yes.

338 Q. Let us move it ahead the distance you saw it travel, which you estimated to be 15 feet, and which we measured. A. It came to about there (indicating).

Q. About there? A. That is right.

Q. Move it an additional distance to where you say it traveled before the car began to pivot. A. I would say just about like that (indicating).

Q. That is about in the middle of the intersection? A. No, sir, it was not quite in the middle.

Q. About how far from the middle of the intersection was it? A. With the center line of the street running this way, the car had not reached yet what would be the center line, as I would see it looking this way (indicating).

Q. Do you mean the center line going down this way (indicating)? A. The car had not reached the center of the intersection, the center of Broadway intersection.

Q. And you indicated the line that is going down the center of Broadway as though it would go straight across Conowingo Road? A. Assuming it would go straight across.

Q. Approximately how far was the front end of the Ford car from the center line, from where the center line
339 of Broadway would strike Conowingo Road about the center of the road? A. I would have to ask you to repeat that.

Q. If this car was in the center of the road and coming straight ahead—and you have indicated that it went straight ahead—and the line in the center of Broadway went right straight ahead where the two center lines would meet, how far was the Ford from that point at the time you last saw it when it began to pivot? A. A few feet—I cannot say. Those things happen so fast you do not have time to see feet and inches.

Q. Would you say about that distance—3 or 4 feet?

A. Possibly.

Q. What is your best judgment? A. The best I can judge is that he had not reached, in my opinion, the center of the intersection before he started to slide.

The Court: Yesterday you said he had reached the center of the intersection before he began to turn the wheel.

The Witness. No, sir; the mark over there would indicate it.

Mr. Quinn: Put the mark where it was. It is not the center of the intersection.

The Court: He was asked specifically whether it was in the center, and he said yes.

Mr. Quinn: Here is the center mark, coming down
340 here (indicating).

Mr. Offutt: I object to Mr. Quinn—

Mr. Quinn (interposing): I submit that we are entitled to have this testimony stated the way it is.

The Court: What he said yesterday specifically in answer to my question was that at the time the wheel was turned, the car was approximately half way between the right and the left side of the Conowingo Road, and, as nearly as he could tell, it was in the center of the intersection.

That is what he said.

Mr. Quinn: Speaking of the center of the Conowingo intersection, and then he placed the mark to indicate—to take into consideration the center line of Broadway.

The Court: Proceed.

By Mr. Offutt:

Q. Will you move this car as you say it traveled from the time it began to skid until the impact between your car and that car? A. This (indicating) is the point. I told you the wheels were cut hard, that is, way to the right. The car went like this (indicating), and the rear end began to pivot.

By that time, I have told you that I had proceeded up here (indicating), and was probably 15 or 20 feet from the intersection.

Q. Complete the movement of the car until it
341 crashes your car—but don't break them up.

(The witness did as requested.)

Q. So that, as you maneuver these cars, the front end stayed still right in the center of the street, about the center of the street, and swung around—is that your testimony?

A. It went this way (indicating); it come around like this (indicating) and began to pivot, and the front end went around into a slide.

Q. Didn't you yesterday testify, when the Court asked you about it, as to where this car was when the wheels were turned and it started to skid, didn't you say that the car was half way through the intersection? A. I thought it was approximately half way through.

Q. Didn't you say it was half way across Broadway Avenue at that time, and half way through the intersection? A. I would say it was approximately that way. I can indicate better than I can estimate.

Q. You said it was approximately half way across the intersection and half way in between the two curb lines? A. I said it was approximately that.

Q. Didn't you say— A. (continuing) I could not be definite about it.

The Court: I think that he has answered it satisfactorily. There is no use going over it again.

By Mr. Offutt:

Q. You do not work for the Nu Car Carriers? A.
342 No, sir.

Q. And you have not worked for them for about three years? A. Approximately.

Q. Just a short time after this accident happened, you severed your connection with them? A. That is right. At that time I was to go to the Coco-Cola Bottling Works.

Q. Do you have a real recollection of the incidents that occurred on the day of this accident? A. I don't remember a whole lot about it. That has been three years ago, to bring it back to my mind.

Q. You have had no occasion to go over that collision, what occurred on that day, until just a few days before the trial started? A. That is true.

Q. Going back to this hearing which you said took place in the police car out in front of the justice of the peace's house— A. I don't know where it was. We were parked on the street.

Q. In front of some house? A. Some building, yes, sir.

Q. Do you know Judge Spencer? A. I know him when I see him.

343 Q. You know him from seeing him at that time?
A. Yes.

Q. You said there was a hearing out there, if I understood you correctly. A. I would not know exactly what was a hearing.

Q. Were you put under oath? A. I don't even remember.

Q. You don't remember that? You don't remember whether this man Traynor was held or not, do you? A. I know that he was fined.

Q. You know that? When did you determine that he was fined? A. When he asked his son or somebody to get the money from his pocketbook.

Q. Did you see him get the money? A. I don't recollect that I saw the money. I remember him asking him to get it, but I did not pay attention to it.

Q. How much money was it? A. I don't even remember. I did not pay attention to it.

Q. Had your case been dismissed before he got the money? A. I did not get that.

Q. Had the case against you been dismissed before he got the money? A. I assume that I had been dismissed, but I asked the officer.

344 Q. Before he got the money? A. I don't remember that, whether before or after.

Q. Was it before they had this hearing that you are talking about or afterwards that you learned that he was going to be fined? A. I assumed, if he was reaching for money, that that is what it must be for.

Q. Was he on a stretcher at the time? A. I don't know whether you call it a stretcher or not. It was a special built seat or something that the Maryland Police cars are equipped with.

Q. Didn't they carry him into the doctor's office when you got there? A. On some sort of improvised affair.

Q. Wasn't it the same thing he was lying on at the time? A. He was not lying. He was in a reclining position, but not lying down flat.

Q. Did Mr. Traynor walk into the doctor's office? A. I don't remember whether he did or not.

Q. Did he walk out? A. I don't remember that.

Q. Were you in the doctor's office when he examined him? A. Yes, sir.

Q. Did he stand up without any help? A. I don't
345 remember. The doctor was putting him through several maneuvers there, but just what they were I don't know.

Q. Did the doctor charge him anything in your presence? A. I don't know whether he did or not.

Q. Were you there all the time? A. I was there, but I didn't pay particular attention.

Q. Were you there from the time he went in until he came out? A. I think so.

Q. Were you in the same room? A. Yes, sir. I was back in the other end of the room.

Q. You were watching the doctor, weren't you? A. I was not paying any attention to him.

Q. Weren't you interested to know whether the man was hurt badly or not? A. But I did not make it a point to interfere with the doctor.

Q. When the accident happened, did you go down to help the man out of the car? A. I naturally went to see if I could be of any assistance.

Q. Were you hurt? A. Not at all.

Q. You don't know whether you drove your car
346 around the corner or not? A. As I recall, we had to push that trailer around the corner.

Q. Didn't you say on direct examination when Mr. Quinn was asking you, "I don't think I operated the car after the

accident; I am not sure." A. That is what I said. I think we pushed it around.

Q. When you say you think, you mean that you are not sure? A. As well as I remember. I don't want to make a definite statement where I can't remember clearly.

Q. You might have driven around? A. I don't think so. It is possible, but I don't think so.

Q. You have no distinct recollection on it? A. The full details escape me. I just can't go back three years and pick up every little incident that happened.

Q. When you say you think you pushed it around, do you think you pushed it around alone? A. No, there were other people—there is always a crowd.

Q. The left front fender of your car was scratched? A. That is part of the damage.

Q. The left front headlight was damaged? A. That is part of the damage.

347 Q. You said that Mr. Traynor signed a paper for you. A. That is right.

Q. And you got this paper from somebody else? A. That is right.

Q. So—

The Court: You said that you got the paper from another truck driver.

The Witness: Yes, sir.

By Mr. Offutt:

Q. And this other truck driver came along after the accident occurred? A. That is right.

Q. When did you get that paper?

The Court: Are you supposed to have a supply of these papers in your truck?

The Witness: Ordinarily we do.

The Court: Proceed.

By Mr. Offutt:

Q. When Mr. Traynor was taken away from where he stopped in front of the house, when you say Judge Spencer came, out, he was carried back to his car, wasn't he? A. I don't know anything about what happened after that. I went to the truck.

Q. You did not go back to the car and help him into his automobile? A. No, I didn't have anything to do
348 with that.

Q. You were not there? A. No, sir.

Q. Were you there when they took him out of the car and put him in this conveyance and carried him to the doctor's?

A. From the scene of the accident?

Q. From the scene of the accident. A. Yes.

Q. Didn't Mr. Traynor appear to be hurt to you then? A. He appeared to be hurt, yes, and bruised.

Q. Didn't he complain that his right leg—that he could not walk on it, and wasn't he in a semi-conscious condition?

A. He complained that his leg hurt and that he was sore, but he apparently was fully conscious.

Q. You mean by that that his eyes were open? A. Sure.

Q. At the time of this accident, did you know who owned that car? A. You mean, owned the car that Mr. Traynor was driving?

Q. The Ford car. A. Why, no. Right at the time, I had no occasion to know who owned it.

Q. You later learned that William F. Traynor
349 owned it—isn't that right? A. He or his son; I don't know which.

Q. Do you know what his son's name is? A. I think it is the same—Junior.

Q. Did you see the registration card? A. I don't recall that I did.

Q. This paper that you had, signed paper, wasn't a memorandum that you had so that you would know who was driving the other car? A. Which paper do you have reference to?

Q. The paper that you said you asked him to sign. Don't you have to make a report to your company when you have an accident, telling who owns the other car? A. That is right.

Q. And you have a form to fill in? A. You have a few blank lines, to add in the names of the involved people.

Q. It is a form that they furnish you? A. That is right.

Q. On that form that was furnished you, did you put on there that William F. Traynor, sr., was driving it, and that William F. Traynor, Jr., owned that car? A. I don't recall that I put the owner's name on. I do not think that it is required.

Q. Do you know whether it is required? A. As well as I remember, that is not required. It is the name of

350 the man that was driving the car that we were particularly interested in having sign it.

Q. Why was that? A. That was because the man that was driving it was the man, in my opinion, that I wanted to sign it.

Q. You knew the man that was driving the car was hurt? A. I knew he had been hurt, but, how badly, the doctor had said that he was not seriously hurt.

Q. You knew he was hurt and might make a claim against your company, and you wanted to let them know the man was hurt? A. You mean, the purpose of that blank?

Q. That is right. A. The purpose of that blank—

Q. (interposing) No, not the purpose of that blank. A. I don't understand what you mean.

Q. Didn't you put down the name of either the owner of the car or the driver? A. I put down the name of the driver. I don't remember putting down the owner. I don't think that is required.

Q. How many people helped Mr. Traynor to get into this conveyance that carried him to the doctor's office? A. I don't recall. There is a crowd of people that mill around those things.

Q. Did you help them? A. I don't even recall whether I helped him or not.

351 Q. Can you state whether or not Mr. Traynor's hands were cut? A. Not visibly. I don't know definitely whether they were or not.

Q. Were his glasses broken? A. I don't recall whether they were or not.

Q. Was his eye cut, over the top of his eye, alongside of the face? A. I don't recall.

Q. Wasn't he unconscious at first after the accident? A. No, sir, I don't think so.

Q. Did you go right down to the car after the collision occurred? A. He was right approximately in front of me. I could look directly to my right. He was right in front of my car.

Q. How far in front of your car? A. It hit and bounced back about a foot, so he was not but a short distance from me. I got right out of the trailer.

Q. When the officer got there, was he still one foot from your car? A. The cars had not been moved.

Q. He was still in that position? A. He was still in that position.

Mr. Offutt: That is all.

352 Redirect Examination

By Mr. Quinn:

Q. You said, in answer to Mr. Offutt's question, that you left the employ of the Nu Car Carriers shortly after this accident. A. Yes, sir.

Q. Did the accident have anything to do with your leaving? A. No, sir. I had made contact with the Coca-Cola Company before.

Q. Why did you go to the Coca-Cola people? A. It is a job where I could be at home, and it pays more money?

Q. Did you know Officer Santee or Judge Spencer before this accident occurred? A. No, sir.

Q. Had you ever seen them, to your recollection? A. No, sir, never.

Q. When you went back to Chester with the man who came with the new tractor and to take the damaged tractor and trailer back to Chester, did you meet any other employee of the company on the road? A. Yes, sir, Mr. Westcott.

Q. Mr. Whom? A. Mr. Westcott.

353 Q. Which way was he traveling, and in what direction? A. He was coming south toward Bel Air.

Mr. Quinn: That is all—pardon me.

Q. You have told in substance what this exoneration form contained. I ask you to look at this defendant's Exhibit A for identification, and ask you if that is the type of form that was used. A. That is the type, yes, sir. I don't know the exact wording.

Q. I think you said that the form was printed? A. Yes, sir, it is a printed form.

Q. What portion of the form would you fill in?

Mr. Offutt: I object, unless that is an exact replica of the form.

The Court: Mr. Quinn, this witness yesterday was unable to state anything that was on that paper. The only thing he could state was a conclusion; and, that being so, the Court cannot admit that as a copy, on the theory that the original has been lost.

Mr. Quinn: He stated that it exonerated him from blame.

The Court: I know he did, but that is a conclusion.

Mr. Quinn: I propose to show that those are just the words that are in the form.

The Court: He was unable yesterday to tell you what words were in the form, and therefore he cannot tell
354 you today by hearing what you say is alleged to be a copy. The Court rules that it is not admissible in evidence.

Mr. Quinn: I have not offered it yet.

The Court: I thought that was the purpose of it.

Mr. Quinn: I just wanted to lay the foundation, and follow it up by showing the disappearance of the original.

But I should show how much he knows about it.

The Court: He testified to all that in chief, over and over again. Over and over again you asked him what was in the copy, and he could not tell you.

Mr. Quinn: Let me ask you, Mr. Emmert—

Q. In this form that you had Mr. Traynor sign, did you fill in your name? A. Yes, sir.

Q. As the driver of the truck? A. Yes, sir.

Q. How was that filled in, with ink, or pencil? A. Pencil.

Q. How did Mr. Traynor sign his name, with ink or pencil? A. That was with pencil, too.

Mr. Quinn: That is all.

Mr. Offutt: That is all.

Mr. Quinn: Call Mr. Westcott.

355 Thereupon **Wallace L. Westcott** was produced as a witness on behalf of the defendant; and, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Quinn:

Q. Mr. Westcott, your full name? A. Wallace L. Westcott.

Q. How are you employed? A. I am at present employed as a trailer driver for Nu Car Carriers.

Q. A trailer driver? A. Yes, sir.

Q. How were you employed in October, 1936? A. Assistant service manager at Chester.

Q. For the Nu Car Carriers? A. Yes, sir.

Q. On October 17, 1936, did you receive any notice of or hear of an accident that had occurred at Bel Air, Maryland, between a Nu Car Carriers trailer and another car? A. I did.

Q. Where were you at the time that you heard of the accident? A. I was in the office.

Q. In the office at Bel Air? A. No, in the office at 356 Chester.

Q. Do you know what was done with reference to your tractor that was involved in the accident after the report came in to Chester? A. You mean, the repairs had?

Q. No; how it was gotten back to Chester. A. I sent two men after it with another trailer.

Q. With another trailer? A. To take it in.

Q. After that, did you leave Chester? A. I left Chester a short time after they did, going down No. 1 highway. I had occasion to go down that highway.

Q. Did you go down on business of the company? A. On business of the company, yes, sir.

Q. When you went down No. 1 highway, did you travel in the direction of Bel Air? A. I went through Bel Air.

Q. Did you see the tractor that had been in the accident when you were traveling toward Bel Air? A. I met them a short distance before I got into Bel Air. They were on their way into Chester.

Q. Where was the tractor that had been damaged? A. They were loaded onto our trailer, hauling it in.

Q. Loaded it on the trailer—is that correct? A. Yes, sir.

Q. Did you stop and talk to the men then? A. I 357 did not.

Q. Where did you go after you passed them? A. I continued on down to where they had had the accident.

Q. Had you learned at Chester as to just where the accident happened? A. Yes, sir. The drivers have to report where they are, so that we know where to pick them up.

Q. Did you go to the scene of the accident? A. I stopped there, yes.

Q. Was the other car there at that time? A. There was no vehicles at all whatsoever at that time.

Q. Did you examine the scene of the accident? A. I did.

By the Court:

Q. How long after the accident? What time was it you got to Bel Air? A. I cannot state the exact time. I should say in the neighborhood of two hours after the accident happened I got there.

The Court: Proceed.

By Mr. Quinn:

Q. What did you observe at the scene of the accident? 358

Mr. Offutt: I object.

The Court: Objection sustained.

Mr. Quinn: I propose to show by the witness what he observed in the way of debris and glass, and its position on the highway.

The Court: It was two hours after the accident, and he could not possibly identify what he saw as this accident. He might have had an opinion about it, but it could not be legal evidence. The objection is sustained.

By Mr. Quinn:

Q. Mr. Westcott, did you see Mr. Emmert again? A. I saw him after I came back in to Chester.

Q. When was that? A. That was somewhere about four and a half hours after the accident.

Q. Was any report made to the Chester office concerning this accident? A. Yes, sir.

Q. Did you see that report? A. I did.

Q. Was there any other paper with the report? A. There was a card that he had to turn in—every accident they have to get a card and make out a report of the accident, and get witnesses if they can possibly do so.

Q. Was this cardboard or paper thick paper or just 359 paper? What was it you referred to? A. Well, it is a card about the thickness of a postal card.

The Court: Did you see the card that day?

The Witness: I did, yes, sir.

The Court: Proceed.

By Mr. Quinn:

Q. What is that card called? A. Well, it is a card, if you are not at fault in the accident you can get the people in-

volved in the accident to sign that and clear you. It is for your benefit in retaining your job.

Q. Was that card signed by anyone? A. It was signed, yes, sir.

Q. Who turned in the card? A. Mr. Emmert turned it in to me.

Q. That is the driver of the tractor involved in the accident? A. Yes, sir.

The Court: Did you see the card signed?

The Witness: I did not see the card signed.

The Court: Your testimony is not admissible.

Mr. Quinn: I propose to show, following up the testimony of the driver, Emmert, that he got this man to sign the blank which he said exonerated him from blame, 360 that he turned it in at the office—he turned it in to this man, and that this man saw the blank signed just the way Emmert says it was signed.

The Court: You know that that is not admissible, and that statement is not properly to be made to the jury, and the Court will not admit the testimony.

Mr. Quinn: In order to save the rights of my client—

The Court: You know and I know that this man cannot testify that the plaintiff signed a paper unless he saw it signed.

Mr. Quinn: I am not asking him to say that. He simply said that he saw the paper. I am following it up step by step.

The Court: But unless you are ultimately able to establish the fact that he saw the paper signed, these further steps are not proper, because it is getting something before the jury that should not be gotten before it.

Mr. Quinn: I propose to show that this boy did what he claimed he did, and turned it in to this man, to account for the loss of the original.

The Court: In the first place, you have not established what is in the paper yet, and have not established a thing about it, except this boy's conclusion. This testimony is clearly not admissible, Mr. Quinn.

Mr. Quinn: I am making the tender, and the purpose of making it is this, simply to comply with the requirements of the Court of Appeals, and that is that if I make an 361 offer of evidence, I have to apprise the lower court as to what I expect to prove; and that is all I am doing.

The Court: Proceed, sir.

Mr. Quinn: I am proposing to ask this witness further as to what he did with the paper that was turned in—

Mr. Offutt: I do not know what Mr. Quinn expects to say in the presence of the jury in the way of proffering proof, but I submit that if he has any proof to proffer, it should not be said in the presence of the jury. He should come to the bench.

The Court: The jury is excused for the present.

(After the jury had retired:)

Mr. Quinn: I want to ask the witness what he did with this card that he described, when it was turned in to him, what became of it—

The Court: Anything else?

Mr. Quinn: And then I propose to show by him just where the card went to, what was done with it, and, of course, I will have to take the other steps, as to what became of it when it went to that place, as the witnesses are produced.

The Court (to Mr. Offutt): Do you object to it?

Mr. Offutt: I do object to it, and I think at this time, in the economy of time, Mr. Quinn ought to state to the Court his entire offer of proof, rather than to take it piecemeal.

Mr. Quinn: When I have covered that, I intend to proffer proof to show that the exoneration blank which this
362 man signed was the one which I have identified as Defendant's Exhibit A, the driver's exoneration form, under date of October 17, 1936, saying:

“TO WHOM IT MAY CONCERN:

“I hereby exonerate Driver George Emmert, of the Nu Car Carriers, from all blame or negligence in connection with an accident involving the undersigned at Bel Air, Maryland, on this date, 10/17/36.”

Signed “William Traynor, Address 3315 North Paltorpe Street, Philadelphia, Pennsylvania.”

Mr. Offutt: Is that all?

Mr. Quinn: That is all.

Mr. Offutt: I think, for the purpose of the record, it ought to be shown that the paper from which Mr. Quinn reads is a typewritten paper, entirely typewritten.

Mr. Quinn: Of course it is. It has been identified as a copy. I am not trying to conceal anything.

Mr. Offutt: I object to it.

The Court: As the offer is made, the only thing the Court can do is to admit the testimony subject to exception and ruling on it after it goes in.

Tell the jury to come back.

(After the jury had returned:)

By Mr. Quinn:

Q. Mr. Westcott, when this paper was turned in to
363 you, this form that you described, was there any signature on the bottom of it? A. Yes, sir.

Q. Can you recall whose signature it was now?

Mr. Offutt: I object.

A. Not at the present time, I cannot; I could not say whose signature it was.

By Mr. Quinn:

Q. How was the signature written? Was it in ink, or pencil? A. Everything was made out—the whole form was made out in pencil.

Q. The form itself, will you tell the jury whether or not it was a printed form? A. The questions were printed. All the questions were printed in.

The Court: He says—the answer is that all the questions were printed in.

The Witness: It is a regular form, you see.

Mr. Quinn: I do not mean the report of the driver.

The Court: Just one minute. He says that the paper signed by somebody was a paper with questions on it, and the questions were printed—is that correct?

The Witness: Yes, sir.

By Mr. Quinn:

Q. Mr. Westcott, how many papers were turned in
364 by him? A. A copy of his accident report, and this insurance card.

Q. The accident card, how is that made up? A. It is made up in carbon copy of four forms.

Q. Is it a printed form that they fill out, the accident report? A. Yes, sir.

Q. In just what form is it? What is the printed part? A. It asks you questions, where the accident happened, and how it was involved.

Q. That is the question form that is printed? A. More or less question form.

Q. And the answers are written in after that? A. You fill in the answers afterwards.

Q. There was a form like that turned in by Emmert? A. Yes, sir.

Q. This other paper that he had that day, that you referred to as a card, how was that made up? A. Part of it is printed, and you fill it in.

Q. Is that question and answer, that card? A. It has more or less questions on it, asking questions on it.

Q. On that card? A. On the card, yes, and then there is lines to be written in, other things you wish to write in.

Q. Can you recall approximately how that was worded, this form that he turned in? A. Not at the present time.

Q. Have you any copies of the printed form that you used? A. I have not here at the Alexandria branch, I don't think.

Q. Do you know whether Mr. Haywood has any? A. I don't think so. There might be some in some of these trucks.

Q. What was the nature of the damage to the tractor that was involved in the accident?

The Court: He did not see it at the time of the accident. He saw it two or three miles out in the country.

By Mr. Quinn:

Q. Did you see the tractor?

The Court: He passed it, as I understand it.

Mr. Quinn: He went back to Chester, to the shop.

Q. Did you go back to Chester afterwards? A. Yes, sir.

Q. Did you see the tractor that was involved in the accident? A. I did.

The Court: Unless you can show that the tractor was in the same condition as it was immediately after the
365 accident, the testimony is not admissible.

Mr. Quinn: Well, I will show that.

The Court: All right, sir.

By Mr. Quinn:

Q. Where did you see the tractor? A. The tractor was sitting on the wash rack, in front of the shop.

Q. Did you have anything to do with repairing the tractor afterwards? A. I had to give the orders to have it repaired, yes.

Q. Did you see George Emmert there at Chester when you saw the tractor? A. He was in the building at the time I was out looking at the tractor.

Mr. Offutt: I do not mean to object, but it may be very important. I object to Mr. Quinn's leading form of questions.

The Court: They are preliminary questions, as I understand it.

Mr. Offutt: I just do not want him to continue it.

By Mr. Quinn:

Q. What was the condition of the tractor when you saw it there in front of the building? A. The supports of the superstructure, that is, the part that carries the car overhead, was broken, and we replaced a bumper by putting a channel iron on.

367 The radiator and grille were mashed back on the motor, and the lights were broken.

Q. What? A. The headlights; and the fender, the left fender was damaged more than the right fender was; both fenders were damaged.

Q. How about the damage to what we call the radiator grille? A. That was mashed in.

Q. All the way across in front? A. It just mashed it right back in on the motor.

Q. What was the damage to the motor? A. That I cannot—we changed the motor; we took that motor out and changed it.

Q. Do you recall whether you attempted to operate that motor before you made a change? A. I did not, no.

Q. Now, will you describe to the jury just where those irons were located on that particular tractor, those supports that came up. A. On those type trailers, we would take the bumper off and put on a channel iron 3½ feet 2 inches, and reinforce the supports from the frame out, because there is braces goes from this channel iron to the runways to support the car on top.

Q. You mean that there is a runway that comes out
368 over the top where the driver sits? A. Yes, sir.

Q. And runs out toward the front of the cab? A. Runways on each side, controls the cab and turns it in front.

Q. So that when the driver is sitting in his cab, there is a car over him like that (indicating)? A. Yes.

Q. And these channel irons you speak of support those rails? A. Support your runway that the car rides on.

Q. Can you give us the measurement of the length of the trailer and the tractor of that particular type of trailer and tractor? A. It is practically 39 feet, the over-all length.

Q. That is, from the front bumper back? A. From the front bumper to the tail end of the trailer.

Q. I think you said the channel irons were bent. A. The supports from the channel iron to the runway that hold the car, they were bent back.

Q. How badly were they bent? A. Broken to that extent that we had to remove that bumper and put on another one—that channel iron.

Mr. Quinn: Will one of you men ask Mr. Haywood to give you the picture he has?

369 Q. I show you a framed photograph, Mr. Westcott, and ask you if that is the exact type of tractor that was in this accident?

Mr. Offutt: I object to that. That is a very leading question.

The Court: Let me see the photograph, please.

Mr. Quinn: We have not a photograph of the exact tractor, but the witness can explain what the difference is, and explain those supports for the rails.

The Court: Now, Mr. Offutt, will you look at this photograph and then state whether or not you object to it?

Mr. Offutt: Very well, your Honor. We have no objection to it.

The Court: Proceed.

By Mr. Quinn:

Q. Will you step down so that the jury can see what you are talking about?

Now, will you describe the track or rail that you spoke of that the car rested upon, to the jury, that is right underneath that car? A. We use a socket to run from here (indicating) out to that rail, on each side to run this car up the top, and these supports that were broken run from here (indicating) down to this angle iron; we used that in place of the bumper to support this front, so it won't break down.

370 Q. Now, is the support on this tractor shown in this picture in the same position as it was on the one that was involved in the accident? A. No, it is not.

Q. Tell the jury where the difference was. A. This support comes down through the fender, so we had this changed from the fender and put out where the bumper originally was; we put the support from there up here (indicating), instead of putting it through the fender, on account of damaging the fender.

Q. What about the length of this particular tractor and trailer shown in this picture as compared with the one that was in the accident? A. This here is a longer trailer; the other one was shorter.

Q. How much longer is it than the one involved in the accident? A. This one at the present time is 5 or 6 feet longer than the other.

Q. The other one is around 39 feet, you say, from tip to tip? A. From tip to tip.

Q. Did this tractor that was involved in the accident, or the trailer, have any load on it that day? A. No, sir, it was coming in empty.

371 Q. Now—

Mr. Offutt: I object to that—I withdraw the objection.

By Mr. Quinn:

Q. Mr. Westcott, what did you do with the report and the card that Emmert turned in to you? A. I clipped them together and put them in a filing case which I kept for them.

Q. Up at Chester? A. Yes, sir.

Q. You did not do anything further than that with them? A. No.

Q. Have you seen them since? A. I have not.

Q. Where are you stationed now? A. I am stationed at Alexandria now.

Mr. Quinn: That is all.

The Court: Mr. Quinn, I am now prepared to rule that the testimony that you tendered will not be admitted in evidence.

Mr. Quinn: I did not quite understand.

The Court: The testimony which you tendered when the jury was out will not be admitted in evidence. You made your tender and put it in the record.

Mr. Quinn: Well, I have not come to the point where I am offering any evidence in the way of a paper or
372 copy, because I am taking this step by step.

The Court: I do not want the necessity of sending the jury out again.

Mr. Quinn: No; the jury would not pay any attention to what I said, anyway, but I simply want to show by this witness the steps he took, and what he knew about it.

Mr. Offutt: No questions.

The Court: Step down.

Mr. Quinn: Call Mr. Haywood—before you call him, Mr. Emmert, you take the stand again, please.

Thereupon **George Emmert** was recalled for

Further Direct Examination

By Mr. Quinn:

Q. Mr. Emmert, when you went back to Chester after the accident with the damaged tractor, what did you do with it?

A. The tractor was unloaded off the other trailer and placed at the time on the lot, on a wash rack.

Q. Did you during that day see Mr. Westcott at Chester?

A. Yes, sir.

Q. Did you see the tractor, too? A. Yes, sir.

Q. Did you see it while Mr. Westcott was there? A. I was inside making out a report when Mr. Westcott
373 walked in.

Q. Then did you see the tractor after he walked in? A. I did not get that.

Q. Did you see the tractor after he walked in, the damaged tractor? A. After I had made out the report, before I left, I went out and looked at it again.

Q. Had there been any change made in the tractor since you brought it up from the scene of the accident? A. No, there was nobody working on the job. It was not touched.

Q. Was it in the same condition as when you took it from Bel Air, when Mr. Westcott came back to Chester?

Mr. Offutt: I object, unless he examined it before he left Bel Air.

I will withdraw that. A. There had been no occasion to touch it. There were no mechanics working. It was just unloaded and left setting there.

Mr. Quinn: That is all.

Mr. Offutt: That is all.

Mr. Quinn: Call Mr. Haywood.

Thereupon **James M. Haywood** was produced as a witness on behalf of the defendant; and, after being first duly
374 sworn, was examined and testified as follows:

Direct Examination

By Mr. Quinn:

Q. What is your full name? A. James M. Haywood.

Q. How do you spell Haywood? A. H-a-y-w-o-o-d.

Q. How are you employed? A. I am the representative of the Nu Car Carriers in the Washington and Alexandria area.

Q. How long have you been working for Nu Car Carriers, Inc.? A. Since 1933. At that time it was known as the Nu Car Forwarding Company. In 1935 it changed ownership and became known as the Nu Car Carriers, Incorporated. I retained my same job as with the predecessor.

Q. How many offices has the Nu Car Carrier Company? A. Two.

Q. Where? A. The main office is at Chester, Pennsylvania. We have a branch office at Alexandria, Virginia.

Q. I think you produced this photograph, did you not, of a tractor? A. Yes, sir, I did.

Q. Will you tell the jury what the difference is between the tractor in this photograph and a tractor of
375 the type that was involved in the accident at Bel Air?

A. That is the only photograph I had available.

The tractor involved in the accident at Bel Air had this support here (indicating) running right directly from the bumper up to there. You can see that this support here

(indicating) has been changed and put back of the headlight and runs down through the fender on the frame; that was to give the structure up here (indicating) better balance, and this particular trailer here (indicating) is 5 feet longer than the trailer that was in the accident at Bel Air. This is 44 feet. The one in the accident at Bel Air was 39 feet over-all.

Q. By over-all, you mean including the tractor and the trailer from tip to tip? A. Yes.

Q. And this one is 44 feet? A. Yes, sir.

Q. Mr. Haywood, did you make a search at anyone's request to find a copy of an exoneration report?

The Court: Mr. Quinn, as I understood it, you made your offer when the jury was out. The Court is prepared to rule on that offer. The testimony is not admissible, because it is hearsay, and therefore the Court cannot permit you to proceed with this witness.

Mr. Quinn: What portion of the testimony is it
376 that your Honor rules is hearsay?

The Court: The portion of the testimony which you offered while the jury was out, what you said you would produce while the jury was out, and if this is a part of it, the Court rules that all of that is inadmissible, because it is hearsay testimony.

Mr. Quinn: As to this witness, it is just testimony that—

The Court: Is it a part of your offer? Is this witness a part of your offer?

Mr. Quinn: Oh, yes.

The Court: Then I cannot admit it.

(The following proceedings were thereupon had at the bench, out of the hearing of the jury:)

Mr. Quinn: In order to account for the absence of the original, counsel has to show what steps were taken to locate the original paper, placing it where he first stuck it and the steps taken after that. I propose to show by this particular witness—

The Court: This is all hearsay testimony.

Mr. Quinn: No, it could not be hearsay.

The Court: It is all hearsay testimony except the testimony of the man that saw it signed. He could have signed the paper himself so far as the people in Chester are concerned.

Mr. Quinn: But you have every link forged. The boy says that this paper which they signed he turned in—
377 The Court: But he does not know what was in the paper.

Mr. Quinn: He knows in substance; it exonerated him from blame.

The Court: The Court is prepared to rule. The Court has no doubt about it.

Mr. Quinn: I propose to show by this man—

The Court: You made your offer. If you want to make a further offer—

Mr. Quinn: This will take but a second—to show by him that he made a search at the Alexandria office, that he got in touch with the Chester office, and had them make a search there—

The Court: The Court has ruled on it. If you want to make a further offer, let the jury go out. I do not want anything more said before this jury that the Court has ruled on. That was what the jury was sent out for, so that you could make your offer, and you made your offer, and the Court is prepared to rule that it cannot admit the testimony.

Mr. Quinn: May I then right here, without waiving any rights my client may have, say that I also propose to tender the testimony of Mr. Smith, that he caused a search to be made—

The Court: You made that in your tender.

Mr. Quinn: I want to name the witnesses. I said in general what I proposed to show, and I intend to bring the witnesses. Mr. Smith traced it through the Chester office to an investigator in Philadelphia, that the investigator
378 made a copy of the original and sent the original to the home office of the insurance company, that the insurance company went into bankruptcy, and the receivers appointed by the court—

The Court: If I were counsel on the other side, I would object to that.

Mr. Quinn (continuing): And that the receivers of the insurance company cannot find it.

I do not give a continental damn about “insurance company.” The jury knows about it.

Mr. Offutt: They brought out an insurance card. I have no objection to that portion.

Mr. Quinn: Who brought it out? Will you admit that the original went to the insurance company, and that the insurance company failed?

The Court: Oh, no.

Mr. Quinn: I propose to show—

The Court (continuing): If it is objected to, the Court won't admit it.

Mr. Offutt: I object to it.

The Court: The Court won't admit it.

Mr. Quinn: I propose to show—

The Court: You made all of this tender. It is already in the record.

Mr. Quinn: I am just being doubly safe about it; that is all. A little precaution does not hurt.

379 The Court: The Court has ruled on it, and won't permit you to proceed.

Mr. Quinn: And is it understood that the same ruling would go to Mr. Smith, and to every witness—

The Court: The ruling is on your tender, and that is all that the Court has to say about it; and the ruling, Mr. Reporter, made on Mr. Quinn's tender when the jury was absent, that the testimony is not admissible, is based on two legal principles, one that the testimony is hearsay, and, second, that the witness in chief, the driver of the truck, was unable to state what was on the paper which he stated the plaintiff signed.

Mr. Quinn (to the witness): Mr. Haywood, you cannot testify. You can step aside.

(To the bailiff): Will you see if Dr. Treatmore is there?

(The bailiff reported that he was not there.)

Mr. Quinn: That is the doctor from Philadelphia, who promised me that he would be here this morning. I told him that if he made it by 11 o'clock it would be all right.

The Court: The Court will take whatever steps are proper to give you an opportunity to produce the witness.

Mr. Quinn: I talked to him over the telephone yesterday. Sometimes they miss the train. I tried to induce him to fly, but he is afraid of airplanes.

The Court: If he does not fly any more than I do, he will not be here. (Laughter.)

380 Mr. Quinn: Will your Honor take an adjournment for ten minutes? He might come along.

The Court: The Court will take an adjournment for ten minutes, gentlemen.

(After the recess:)

Mr. Quinn: The defendant rests.

Mr. Offutt: Mr. Traynor, will you take the stand?

Thereupon **William F. Traynor, Jr.** was recalled in rebuttal for

Further Direct Examination

By Mr. Offutt:

Q. Mr. Traynor, you have heard the witness Emmert, the truck driver, testify that your car skidded around the corner, and struck the truck as it was parked? A. Yes, sir, I did.

Q. State whether or not that did happen. A. No, sir, our car did not skid.

Q. Did it at any time go over on the other side of the road and strike his car, as stated in his testimony? A. No, sir.

Mr. Offutt: That is all.

Cross Examination

By Mr. Quinn:

Q. You said, I think, at one time that one of your
381 wheels was broken on your car after the accident—is that correct? A. Yes, sir.

Q. Which wheel was it? A. The left rear wheel.

Q. What was the nature of the break? A. It appeared to me that the bumper had hit the wheel in the hub.

Q. It is not what it appeared to be. What was the break in the wheel? A. I want to explain how the wheel had been broken to you. The bumper had hit the hub and the rim of the wheel and bent the wheel around the bumper.

Q. The bumper had hit the wheel? A. And the hub.

Q. And it bent the wheel around what? A. Around the bumper.

Q. Was there any damage to the tire? A. No, sir, the air stayed in the tire, but after the accident I let the air out so it would not ruin the tire.

Q. Say that that wheel—let us assume that this Bible is the wheel, and the truck came in this way (indicating). Was the wheel bent this way, that is, outside, or bent in?
A. Which way is the truck?

Q. Say that this is your car up here, the one that
382 was damaged. Let us assume that you came in from this left side. Which way was it bent? Out from the car, or in toward the under part of the car? A. The wheel was bent in half-moon shape.

Q. Was the outer part of it out toward the road, or back under the car? In other words, this is the left rear wheel of your car (indicating). Was the wheel bent back under the car, or did it come out from the fender? A. These parts of the wheel here (indicating) had faced out and the wheel had got hit right in here (indicating), and bent it in this way (indicating).

Q. When you first indicated that, you pointed to the top of the wheel. Was it the top of the wheel that was out?
A. Yes, sir.

Q. That came out from the fender? A. That is right.

Q. And the lower part of the wheel went further in under the fender? A. No, sir, that was also out.

Q. That was out, too? A. Yes, sir.

Q. The whole thing was out? A. Yes.

Q. That did not occur from your skidding into the curb did it?

383 Mr. Offutt: I object. How could he know that?

By Mr. Quinn:

Q. That did not occur from your skidding into the curb, did it? A. No, sir.

Mr. Quinn: That is all.

Further Direct Examination

Mr. Offutt: There is one other question that I overlooked.

Q. Showing you plaintiff's Exhibit No. 1, and indicating as you see here right back of the door, will you state what that is, that little line down from the handle on the door?
A. That is a piece of wash line which I had to tie the doors of the car shut with. It is tied from this handle (indicating) and goes right through the top, where there is a hole in it, right to the other side.

Q. Is that the place which Mr. Quinn indicated when he asked you if that was a mark on the headlight? A. Well—

Mr. Quinn: The place I indicated was the place back of that.

The Witness: He indicated this place, too, here (indicating).

By Mr. Offutt:

Q. You are pointing now to the place which you
384 say is the rope? A. Yes, sir.

Mr. Offutt: That is all.

Mr. Quinn: That is all.

The Court: Is there any further testimony?

Mr. Offutt: We rest.

The Court: Do plaintiff and defendant have any prayers?

Mr. Quinn: Yes, I have some.

The Court: Gentlemen, we have to consider these suggested instructions to the jury, and the jury will be excused until a quarter of 2.

Discussion on Prayers

Mr. Offutt: I had some prayers drawn on contributory negligence, but there is no charge in the plea of contributory negligence, and I take it it is not in issue here.

The Court: As the Court sees it this minute, there is a direct conflict between the testimony of the plaintiff and of the defendant, the plaintiff claiming that he made his turn slowly and in such a way as to get around the turn without speeding, and that he was at least from 2 to 3 feet from the white line on the right side.

The defendant on the other hand states that he tried to make his turn and that the centrifugal force was such that on this damp paving the car's rear slued it around, and it ended up on the paving on the wrong side of Broadway.

Now, that conflict is so sharp that it does not seem
385 to me that the question of contributory negligence is involved. The jury has got to believe either one fellow or the other. If they believe the defendant's theory, that would either represent obvious negligence on the part of the plaintiff, or else it would amount to an unavoidable accident and in either case the plaintiff would not be entitled to recover.

On the other hand, if the plaintiff actually was on the right side of the white line up until the instant when the accident happened, he is entitled to recover.

That is the Court's view about it, gentlemen. If you have any suggestions to make contrary to that, I would like very much to hear you.

Mr. Offutt: That is my view, if your Honor please.

Mr. Quinn: That is mine, too; contributory negligence does not enter into it. If it did, I would have pleaded it and urged it.

The Court: You gentlemen have exchanged prayers, have you?

Mr. Offutt: Yes, your Honor.

No. 5—

The Court: You had better re-number your prayers.

Mr. Offutt: May I do that?

The Clerk: He wants to withdraw 5.

The Court: Just re-number your prayers, please.

Mr. Offutt: On instruction No. 4, if your Honor
386 will permit me to do so, I will just withdraw it, and your Honor can charge generally. I believe that that is just a general charge of the law, and I believe your Honor would cover that in your charge anyway.

Mr. Quinn: I don't have No. 4.

Mr. Offutt: I told you I changed them numerically, 1, 2, 3, 4, and 5.

A general charge on that proposition will satisfy me.

The Court: All right.

Mr. Quinn: That is the only good prayer you have got.

The Court: I will re-number this prayer 5 and call it 4. You can withdraw this 4 or not.

Mr. Offutt: Your Honor will charge under the general law?

The Court: It is the weight of the evidence, is it not?

I am going to adopt this practice, if you think it is in accordance with the rule here: After I charge the jury, I am going to ask counsel on either side whether you have any suggestions that you would like to make, or any exceptions that you would like to take, and if you have not, all right. If you have, I will excuse the jury and have you make them out of their presence, and then when they come back, unless we can reconcile all this, you can take your exceptions.

Will that be in accordance—

Mr. Quinn: That will be all right with me.

387 Mr. Offutt: Yes, your Honor.

The Court: In my experience, these abstract propositions contained in defendant's instructions 1 and 2 are not used. There is no legal objection, and they state abstract principles of law correctly.

What does the plaintiff think of them? Has the plaintiff any objection to them, 1 and 2 of the defendant?

Mr. Offutt: No. 1 is all right. We have no objection.

No. 2, if your Honor please—I think that is correct.

The Court: No. 3 appears to be all right, the burden of proof prayer.

What do you say about No. 3?

Mr. Offutt: That is a correct proposition of law, I think, your Honor please.

The Court: Well, now, gentlemen, about No. 4, the Court's inclination is to grant the prayer in the first sentence, but the second sentence which segregates two specific alleged matters of evidence the Court thinks should not be segregated, as they are unduly accentuated, and the Court has grave doubts whether the defendant's witness showed sufficient knowledge of what the paper contained for his testimony to have any weight, anyway.

The Court's inclination is to refuse the second sentence of defendant's fourth prayer.

388 Mr. Quinn: Suppose that we eliminate all reference to the paper, then, and refer simply to what took place in Bel Air?

The Court: What does the plaintiff say about that?

Mr. Offutt: I do not think—I object to that, and think that is improper, in that the first part of this prayer takes care of what they have in mind. This is for impeachment purposes only, and the first part of the prayer takes care of any contradictory statements made at the trial, and the reckless-driving charge—

The Court: The Court does not think that those matters of evidence should be in the prayer, and the Court will strike out the second sentence, and I presume the defendant takes an exception to that action on the part of the Court?

Mr. Quinn: Yes, your Honor.

The Court: Instructions 1, 2, and 3 are granted. 4 is granted as amended, and the defendant takes exception to the amendment, Mr. Reporter.

The plaintiff's prayers, gentlemen. What do you have to say about them, Mr. Quinn?

Mr. Quinn: In the first place, it is attempted to inject into this case something that has not any justification here. You will remember that this declaration was first drawn on the theory that these two cars were both proceeding along Broadway Avenue, and that we did not keep as far to the right of the center as possible. At the last moment they asked leave to amend, so as to put it on the wrong side of the road.

389 Now, the testimony of the father and of the son both show that they had turned and were going up Broadway Avenue as they placed these cars, and they were pointed up Broadway Avenue, and that our car came a little bit over the center line, and when they first saw us, we were just a little bit on the other side of the center line.

The Court: And then apparently made a sharp cut in.

Mr. Quinn: No; as they put it, he just came at an angle. The father said that when he saw the car, it was just about 4 feet away. The way they put the cars on the blackboard, this truck was still back from the intersection there.

He is trying to inject into this case one of these cut-the-corner cases; in other words, that they went too close to the corner as they made the turn.

The Court: That is the plaintiff's testimony. I have never seen a prayer drawn this way, but that is the plaintiff's testimony, because the plaintiff's testimony was that plaintiff was at no time within 2 feet of the white line, and therefore a cut into the white line would have been inevitable if the plaintiff was going to be struck.

Of course, the plaintiff cannot take affirmative advantage of negative testimony, but the effect of the plaintiff's testimony on that—and I watched it as closely as I could—was this, that just before the accident the defendant cut in.

390 That was my understanding of the testimony.

Mr. Offutt: That is our contention exactly, if your Honor, please.

The Court: From the plaintiff's testimony.

Mr. Quinn: Well, if they want to take the position we deliberately ran them down, O. K. by me.

Mr. Offutt: That is not the position at all. There is a distinction between deliberately running them down and—I do not think this has any presence in this case. There is no testimony here at all on either side that our car was making a turn.

The Court: What have you to say about the second prayer, Mr. Quinn?

Mr. Quinn: It states a general proposition of law, but there is no evidence to support it. There is no evidence that we did not reduce the speed, and now they have gone back to the old proposition that they did in the original declaration, of keeping as far to the right of the center as possible. Now, they abandoned that when they amended the declaration.

The Court: The courts have substantially ruled that they ought to keep as far as they can to the right.

Mr. Quinn: That is the regulation in Maryland, that if you are making a turn, you should keep as far to the right of the center as possible. That was the theory of their declaration. They abandoned that and amended it
391 so as to put us over on the wrong side of the road.

Their first declaration assumed that we were on the right of the center, but did not keep as far to the right as possible.

The Court: There the question of contributory negligence might have entered.

Mr. Quinn: It might have, but they abandoned it. They never made any claim that we were on the wrong side at any time in the declaration, but that we were not as far to the right of the center line as possible, which assumes that we were to the right but not as far over as we should have been.

The Court: How is the declaration as amended? I permitted an amendment.

Mr. Quinn: I have not gotten an amendment yet.

Mr. Offutt: It says, "The plaintiff was propelling his automobile in the State of Maryland on Conowingo Road in a southerly direction towards Baltimore on a certain point of said Conowingo Road, to wit, on the right side of Conowingo Road and near its intersection with Broadway Avenue, in the State of Maryland;"—

The Court: Are you talking about the plaintiff or defendant here?

Mr. Offutt: The plaintiff.

"And at the same time and place aforesaid, the defendant, by its agent and driver was propelling and operating its motor vehicle, to wit, Ford trailer-truck in a
392 northerly direction towards Philadelphia on Broadway Avenue in or near the town of Bel Air, Maryland, and was approaching the point where plaintiff was then and there operating and propelling his automobile."

Then it sets forth the regulations.

Mr. Quinn: What does it say about our act of negligence? I wish that I had a copy of that amendment.

The Court: Has the declaration actually been amended?

Mr. Quinn: No, I do not think so.

The Court: Has an amended declaration been filed?

Mr. Offutt: No, I did not understand your Honor to mean that we had to file an amended declaration.

The Court: What did you understand?

Mr. Offutt: I understood that we could change the declaration.

The Court: It is still an amended declaration. Have you actually amended it?

Mr. Offutt: I thought Mr. Fonbuena—I was in this dilemma, and I want to explain why I did not personally take care of that.

The Court: Just amend your declaration and show it to Mr. Quinn, and then talk about your prayers.

Mr. Offutt: All right, your Honor.

(After a brief recess:)

The Court: Hand this to Mr. Quinn, please.

(A file, presumably containing an amended declaration, was handed by Mr. Offutt to Mr. Quinn.)
393

Mr. Quinn: He has it in there now that they drove on the wrong side of the roadway.

The Court: Yes, sir. What do you now think of the plaintiff's first prayer, Mr. Quinn?

Mr. Quinn: Well, I suppose that is all right.

The Court: The second prayer the Court will have to amend to—

"The jury are instructed that as a matter of law it was the duty of the defendant's truck driver to keep the said truck as far to the right of the center of the road as reasonably possible"—

Because, as I remember, there is nothing in the testimony to show that the speed was not reasonable.

Mr. Offutt: That is right. My only reason in putting all that in was that I thought the jury might consider whether the speed he was going at was a reasonable speed.

The Court: The second prayer is amended to read:

"The jury are instructed that as a matter of law it was the duty of the defendant's truck driver to keep the said truck as far to the right of the center of the road as is reasonably possible as the said truck was going around the curve of Conowingo Road and Broadway Avenue."

Mr. Quinn: May I make this suggestion? If you
394 leave in the word "as," it in effect assumes that it has been found that the truck was going around the curve. If it reads, "if the said truck was going around the curve," it would be better, because it leaves it to the jury to determine whether it was.

The Court: Is that satisfactory, "if they find that the said truck was going around the curve"?

Mr. Offutt: That is all right, but, as I understand it, the prayers of the plaintiff assume those facts to be true.

The Court: You cannot assume a conclusion. In other words, there is evidence both ways. The evidence of the plaintiff is that he was not going around a turn. Your evidence is that he was.

Mr. Offutt: I see. Can we say—that is all right—if, instead of—

The Court: "if the jury finds the said truck was going around"—I think I should change that, to meet the contention of the plaintiff, and say, "if the jury finds that the said truck was starting around"—

Mr. Offutt: Yes, your Honor, that is correct.

The Court: Because that is the plaintiff's evidence.

Mr. Quinn: The words of the statute would say "in rounding the curve"—"if the jury finds that the said truck was rounding the curve."

The Court: All right, sir; that will be all right.
395 Of course, in practice no turn is required—there is no doubt about that, but I think it should be in the language of the statute, as you state.

The third prayer seems to me to be all right, Mr. Quinn.

Mr. Quinn: I am sorry I have to disagree with you on that, because I do not believe that has any place in the case. It does not cure it by striking out the words “contributory negligence.” When you say negligence, under the circumstances he represents, it would still be contributory negligence, and furthermore it would be improper, if this had any place in the case, for the Court to charge the jury as a matter of law that it was not negligence if he did not see the truck until it was 10 feet away.

The Court: What was testified to about 10 feet?

Mr. Quinn: The plaintiff said he did not see it until it was about 5 feet away, and the son said from the chair over to this bench, which I think has been measured as 31 feet.

The Court: How about changing the word “did” to “could”—“could not see the defendant.”

It is none of my business, but I don’t see how that prayer could do the plaintiff any good, anyway, Mr. Offutt.

Mr. Quinn: Of course, the general rule of law is contained in the second sentence of that prayer. It applies to both sides alike.

396 The Court: In that first sentence—

“The jury are instructed as a matter of law that the plaintiff was not guilty of negligence if he could not see the defendant’s truck until it was 10 feet away, and you find from the evidence that the car driven by the plaintiff was on the right side of the center of the roadway”—

I think that would be all right, don’t you?

Mr. Quinn: I cannot see injecting this thing into the case, because it does not help the jury any. It is just confusing.

The Court: I would not offer that prayer myself, but the question is whether I have got to grant it.

Mr. Offutt: That anticipates some argument of Mr. Quinn. Might I ask him if he intends to argue that the plaintiff was negligent in that he did not see the defendant’s truck until he was 10 feet away, as he was rounding the curve?

Mr. Quinn: No. I intend simply to argue, as the evidence conclusively shows, that he rounded that curve at too great a speed on a wet road and skidded on the wrong side.

Mr. Offutt: I will withdraw that prayer, or your Honor may deny it.

The Court: You can withdraw it.

Mr. Offutt: I will withdraw it, then.

397 The Court: Now, the damage prayer, Mr. Quinn.

Mr. Offutt: Sometimes the custom here is, if you want to leave it in there, I can mark it withdrawn and leave it in the file, so that you won't have to disturb the re-numbering.

The Court: The jury does not get these prayers anyhow, as I understand it. I can mark them up any way I please.

Mr. Quinn: I have not any objection to No. 5.

The Court: All right, gentlemen. I grant plaintiff's prayer No. 1, No. 2 is amended, and No. 3. No. 3, Mr. Quinn, was originally 5.

Mr. Quinn: Yes.

The Court: That is the damage prayer.

Mr. Quinn: I am a little bit mixed up. No. 1 is granted?

The Court: No. 1, No. 2—

Mr. Quinn: No. 2 with that little amendment?

The Court: Yes, sir, and No. 3 was originally No. 5. It is granted also. That is the damage prayer.

Mr. Quinn: I thought he withdrew it.

The Court: He did not withdraw the damage prayer.

Mr. Quinn: The prayer he withdrew that I have, 3, was originally 5, and the damage prayer.

The Court: The damage prayer was first 5, then 4, and now 3.

Mr. Quinn: 1 is granted, 2 is granted, and this one
398 is withdrawn, and this is withdrawn, so that there are just three prayers, and I did not object to the damage prayer.

The Court: Now, gentlemen, we will take a recess until a quarter of 2.

(Thereupon, at 12:30 o'clock p.m., a recess was taken until 1:45 o'clock p.m.)

After Recess

1:45 o'clock p.m.

Upon the expiration of the recess, the hearing was resumed.

The Court: Will counsel come to the bench?

(Thereupon an informal conference was held at the bench, not reported by direction of the Court; following which counsel made their arguments to the jury.)

Extract from Argument of Mr. Quinn to the Jury

Mr. Quinn: Throughout this trial, time and time again, the question has come up as to whether a witness has said yesterday what he is saying today, and the question has come up whether I construed the witnesses' testimony on direct examination correctly, or whether I construed it incorrectly or misstated it, and I am going to the record to show you who was right.

399 Let me call your attention to this first point. This witness, when testifying on direct in this case, had referred to the condition of the weather and the condition of the road. Now, I understood him to say, and so construed it, that what he was representing to you was that that road was dry. It did not make any difference whether the man used the exact word "dry"; if he used the equivalent, you and I understood it that way.

When I undertook cross-examination, my attention was called to the fact by the Court that the witness had not stated that the road was dry. It was my recollection, as I stated to the Court, that that was the purport of his statement.

What does the record say? On direct examination, by Mr. Offutt, the question was, "What was the condition of the roadway at the time?"

Mr. Offutt: What page of the record are you reading from?

Mr. Quinn: The reporter is right here, and he has gotten these excerpts from the testimony written up for me.

Mr. Offutt: I object to his reading it as the record, unless he has the whole record, and I have the opportunity to see what he is reading.

The Court: He is reading from one point of the record. He has a right to do that.

Mr. Quinn: And the reporter is here to verify it. He wrote it from his notes, and it is correct.

400 Mr. Offutt: I do not think that he can refer to it as "the record," unless there is a record, and I am afforded the opportunity—

Mr. Quinn: You can ask the reporter for any part you want, and as far as I am concerned the Court can adjourn until tomorrow, until you get it.

Mr. Offutt: Mr. Quinn, that is not fair.

Mr. Quinn: My time is limited—

The Court: I will take the time out as far as this discussion is concerned.

Mr. Quinn has a right to have the reporter write up any part of the record that he sees fit, and to read it. When you argue the case, if you do not think that he has gotten sufficient of the record to be a fair statement of what the witness stated, you can give your version of it.

Mr. Offutt: Very well; I will do that.

Mr. Quinn: Here is the record that the reporter wrote up from his stenographic notes. Mr. Offutt is asking the question on direct examination of his own client:

"Q. What was the condition of the roadway at the time?

A. Well, it was fair. It had been a little damp in the morning when we started out, but it seemed to be very fair at the time of the accident. It did not seem to be wet, or raining."

When a person tells you that a thing is not wet,
401 what does it mean to you? It means that it is the antithesis of wet, and that it is dry. He may say that it is very wet, or slightly wet, but when he says that it is not wet, he means that it is dry.

Then, on cross-examination, I asked him:

"Do I understand you to say that it was a dry road? A. It might have been a little damp.

"Q. Didn't you say on direct examination that it was dry? A. Yes, it was fair—dry. It had been raining. I verified that, that it had been raining, but by the time we got there it had cleared up.

"Q. How soon before this accident had it stopped raining? A. Quite a ways down the road.

"Q. Don't you know it was drizzling rain just as you approached that intersection, and the road was wet? A. Do I know it?

"Q. Yes. A. No, sir, I did not see it rain.

“Q. Was the road wet? A. The road might have been a little damp.”

Then my next question was—

“Why didn’t you tell the jury that at first, when you said it was dry?”

When you say the road is damp, you are saying that it is wet, or slightly wet. Dampness is only a degree of
402 wetness.

I then asked him, as I just stated—

“Why didn’t you tell the jury that at first, when you said it was dry?”

Then the Court said:

“Mr. Quinn, I think that his testimony corresponds to his testimony in chief.

“Mr. Quinn: My impression was that he said it was dry.

“The Court: No, he did not testify it was dry.”

Then I asked him, “What is your best recollection as to the condition of the road? Was it wet or dry?”

And he said, “It was fair. It was not exactly dry. It was damp. Right after the rain, it was damp looking, but it was fairly dry.”

You take a look at the definition of “wet” and “dry,” and what do you find? You find that damp is slightly wet. You find that dry is not wet, and you find that wet is not dry.

So the meaning of it was just as I contended. That is not of a great deal of importance in this case, except that I do not want to be in the position of misrepresenting what a witness said.

The Court: You quoted me, and therefore I have the right to speak. When the witness said the road was fair, he did not say it was dry. Do you still say that he said it was dry?

Mr. Quinn: I still say so.

The Court: All right, then.

403 Mr. Quinn: When a man is asked as to the condition of the roadway, and says that it did not seem to be wet—

The Court: I do not construe the English language like you do.

Mr. Quinn: Well, I am sorry. I learned my English in a pretty good school.

Mr. Offutt: I do not, either, and I learned it in a good school also.

Mr. Quinn: Let us go back to some more of this and clear up the atmosphere. Here was this young man, asked about this tractor. It was important to you to know whether that young man was changing his testimony or not, and as to whether he told the truth this morning identically with what he told you yesterday, and he was asked by the Court, with reference to that tractor, "How far was it from the front of the car that you were driving to the back of the trailer, the extreme end of the trailer? What was the total length from your lamps in front to the tail end?"

And he said, "Twenty some feet; I don't know exactly."

And today it happens he is being asked about this tractor.

He was also asked, "How long is that tractor?"

"I don't know exactly."

"Can you give us any idea? Six feet or seven feet?"

"The tractor would be 14 to 16 feet."

"How long is the trailer?"

404 "A little shorter than that."

"Is it fair to estimate that the tractor is 25 feet long, and the trailer 25 feet?"

"No, that would be 50 feet. It is only some 20 feet."

Again he uses that same expression. And the Court this morning was under the impression that he had said it was exactly 20 feet.

The Court: You again mentioned my name. When you say "20 some feet," that means more than that, but when you say "some 20 feet," that means about 20 feet. It is a very different proposition.

Mr. Quinn: The boy said "20 some feet."

The Court: But you quoted him twice.

Mr. Quinn: Yes.

The Court: And he said "Some 20 feet."

Mr. Quinn: I do not want to enter into an argument with the Court, but I am giving the jury the benefit of the evidence.

The Court: But you are quoting me in it.

Mr. Quinn: Simply the question that you asked.

The Court: I was careful to quote the witness correctly. The truth of the matter is that when the evidence came out, the truck and the trailer are 39 feet.

Mr. Quinn: And the boy had given the approximate dis-
of from here to the end of that bench, as covering
405 what he said was 20 some feet, and then it was
stated that his testimony as to distance was not
worthy of much credence if he had said that that was 20
feet, but what the boy had said was "20 some feet," and
he said he could not say exactly.

(Following the remainder of the oral arguments to the
jury:)

The Court: Now, gentlemen, the Court does not think it
fair to the jury to send you out this late to consider this
case, so the Court will charge the jury at 10 o'clock tomor-
row morning, and the Court will now adjourn.

(Thereupon, at 3:11 o'clock p. m., an adjournment was
taken until Thursday morning, October 26, 1939, at 10
o'clock.)

406

Washington, D. C.
Thursday, October 26, 1939.

Hearing in the above-entitled cause was resumed before
Mr. Justice Goldsborough and a jury at 10 o'clock a.m.

Appearances:

D. K. Offutt, Esq., and
E. N. Fonbuena, Esq., for the plaintiff.
Henry I. Quinn, Esq., and
Richard W. Galihier, Esq., for the defendant.

Proceedings

Mr. Quinn: May we approach the bench?
The Court: Yes.

(The following proceedings were then had at the bench,
out of the hearing of the jury:)

407 Mr. Quinn: In order to safeguard the interests of
the defendant in this case, I am moving the Court at
this time to withdraw a juror and to declare a mistrial, be-
cause of the actions and statements of the Court, which I
consider prejudicial to the defendant, as follows:

First of all, the interruption by the Court of the cross-examination of Dr. Warfield, and the statement by the Court concerning the two thousand cases of war veterans which came before him when in Congress;

Second, the statement made in the presence of the jury concerning the bill of Dr. Warfield, and the assumption that might be drawn from it;—

The Court: What do you mean?

Mr. Quinn: When there was objection to the matter of his bill, because he did not treat the man, but simply examined him, when he claimed it for treatments, and the Court stated that it might be assumed that this man's condition continued and his family was worried about it, and therefore they consulted him.

The Court: The record will show that.

Mr. Quinn: Then the statement of the Court, in the presence of the jury, during the course of the examination of Witness Emmert, that if he is not able to estimate distance any better than he did the day before, the Court did not think that his testimony as to distance is of any benefit;

Fourth, the statement of the Court, during the examination of Witness Emmert, that the witness had
408 said that the automobile was in the center of the intersection, when it turned out that he had not said that;

Fifth, the interruption of the cross-examination of the plaintiff's son, and the making of a statement concerning the witness that it is probable that the witness had never been in court before as a witness; and

Sixth, the action of the Court in interrupting the argument of counsel for the defendant to the jury, and making the statements as shown by the record.

The Court: The motion is overruled.

(Later, by direction of the Court and with the agreement of both counsel, it was directed that at this point the objection of Mr. Offutt to Mr. Quinn's motion should be noted, on the ground that the motion to withdraw a juror was not seasonably made.)

The Court: This second prayer I have amended to read this way:

"The jury are instructed that as a matter of law it was the duty of the defendant's truck driver to keep the said truck as far to the right of the center of the road as reason-

ably possible, if the jury find that the said truck was rounding the curve at the intersection of Broadway Avenue and Conowingo Road"—

409 I have added the words "at the time of the accident."

Mr. Quinn: That is all right.

Charge of the Court

The Court: Gentlemen, at this time it is necessary for the Court to make certain suggestions, legal suggestions, which are formally spoken of as instructions.

First it is necessary to call your attention to the legal rule known as the burden of proof. When reduced to what it really means, it is very simple. A plaintiff cannot require a defendant offhand to pay him money. The law says, of course, that in order for the plaintiff to require the defendant to pay him money, the plaintiff must offer convincing evidence that the defendant owes him money.

Now, if the defendant, after the plaintiff's evidence is offered, in turn offers equally convincing proof that the plaintiff does not owe him money, then the defendant's evidence cancels the plaintiff's evidence, and they stand right where they did, in the same place. So that, in order for the plaintiff to require the defendant to pay him money, the plaintiff must offer evidence more convincing than the evidence of the defendant.

Now, I think that that is a fair statement of what the burden of proof means. In ordinary conversations between men, it means just what would be meant if two men were standing on the street, and one said to the other,
410 "Well, the plaintiff proved his case." That would mean that the plaintiff had offered more convincing evidence than the defendant offered.

If on the other hand the expression is used, "Well, the plaintiff could not prove his case," that would mean either that the plaintiff was unable to offer evidence more convincing than the evidence offered by the defendant, or it would mean that the defendant's evidence was more convincing than the evidence of the plaintiff.

Now, first I desire to call your attention to certain instructions which were requested by the respective parties of the Court; that is, the plaintiff and the defendant both requested the Court to grant certain instructions, and cer-

tain parts of these requested instructions were granted by the Court, and they are as follows:

On the part of the defendant, the Court grants the following instructions:

The jury are instructed that if you find from the evidence that any witness has deliberately falsified concerning any matter about which he could not reasonably be mistaken, then you may, if you see fit, disregard any portion or all of his testimony.

The jury are instructed that if you find from the evidence that any party to this action has failed to call a witness who is peculiarly within his or its control, then you may assume that if such witness had been called,
411 his testimony would not have been favorable to such party.

The jury are instructed that in order to recover in this case, the plaintiff must prove by a preponderance of the evidence that the defendant was negligent in one or more of the respects alleged in the declaration, and that said negligence was the proximate cause of the injury to the plaintiff.

The jury are instructed that in considering the testimony of the witnesses in this case, you should take into consideration their interest or lack of interest in the outcome of the case, their demeanor on the witness stand, their relationship to any party to the cause, the probabilities of their testimony, and any contradictory statements made or any positions taken by them elsewhere than at this trial.

At the suggestion of the plaintiff, the Court grants the following instructions:

The jury are instructed as a matter of law that if you find from all the evidence that upon making a left turn at the Broadway Avenue and Conowingo Road intersection, the defendant's truck driver drove said truck over on the plaintiff's side of the highway, and so cut said corner in making the said left turn, the defendant was guilty of an act of negligence. If you find that this act of negligence was the proximate cause of the accident, causing plaintiff's injuries, then your verdict must be for the plaintiff.

The jury are instructed as a matter of law that it
412 was the duty of the defendant's truck driver to keep the said truck as far to the right of the center of the road as was reasonably possible, if the jury find that the

said truck was rounding the curve at the intersection of Broadway Avenue and Conowingo Road at the time of the accident.

The jury are instructed that if you find for the plaintiff, you should award him such sum as would fairly compensate him for his physical injuries, and also for his pain and suffering, directly resulting from said physical injuries, and for expenses incurred and loss of earnings, if any, and if you believe that the said injuries are permanent, an additional sum to compensate him for his said permanent injuries, future pain and suffering, expense and loss of earnings, not to exceed the amount claimed in the declaration.

Now, gentlemen, the Court is not going to attempt to analyze the testimony for reasons which the Court will give you later in the charge. The Court will, however, and it is the Court's duty to do it, suggest certain legal principles which experience has taught are helpful to a jury in ascertaining what the facts are. It will also be necessary to call the attention of the jury to certain specific rules of law.

The jury, under our system, are the sole judges of the facts in the case. I have not anything in the world to do with them; that is your function and, of course, your responsibility.

413 The contentions of the parties in this case are definite. The defendant's testimony is that the defendant's truck and trailer, 39 feet long, was coming down the street known as Broadway in Bel Air, Maryland, driving at a legal and reasonable rate of speed. The testimony was that the truck was in such condition that it could not be driven rapidly. The testimony of the defendant is that he was as far on the out side of the road approaching the curb as he could get. The defendant claims that he had not gotten to the point of the turn, where the turn should be made, but that as he was approaching the turn the plaintiff's car came into the intersection and, as the plaintiff turned his steering wheel to the right, the rear of his car slue in such a way so that the rear of the plaintiff's car either touched the curb on the right-hand side of the road, from the defendant's standpoint—the right side of the road as the defendant approached the intersection, or very close to it.

Now, then, if the jury finds those facts to be the facts, then there is no negligence shown on the part of the defendant, and either the plaintiff was guilty of negligence, legal negligence, or else the surrounding conditions were such as to cause what is known in law as an unavoidable accident, in either of which cases, as the Court has indicated, the defendant would not be responsible and the verdict of the jury should be for the defendant.

Now, the plaintiff's contention is that he was coming down Conowingo Road at a speed of between 18
414 —around, I think, 18 or 20 miles, and that he slowed up as he approached the crossing, that his car was entirely under control, that he turned the corner without difficulty, and that at no time was he closer to the white line, which he says was in the center of the road, than 2 feet, and that the accident was caused because the truck pulled in at the turn.

Now, then, of course, if you believe that that was the situation, then of course the defendant would be guilty of negligence and your verdict should be for the plaintiff for such sum as will reasonably compensate him, in accordance with the instructions of the plaintiff which I read to you, and it is not necessary for me to go over that again.

Now, those are the two contentions, and, as the Court indicated, I have no intention of commenting in any way upon the weight of the testimony or of the specific statements made by witnesses, and the reason for that is this, that the Court believes that it is inevitable that if a judge undertakes to detail the testimony, it is impossible for him to do it exactly as the record shows it, and that he will either give undue emphasis to one side or the other, and that for that reason the Court should refrain from making any comment upon the specific factors that go to make up the testimony either of the plaintiff or of the defendant.

As the Court indicated, there are certain legal
415 principles which the Court should call the jury's attention to. It is not a question of how many witnesses testified to one fact or another fact. Of course, if the number of witnesses who testified to one specific fact causes the jury to reach a certain conclusion with respect to that fact, it is perfectly all right, but what the Court means is that the jury is not bound to believe that five witnesses

are right and one witness is not right. If the jury believes the one witness and does not believe the five witnesses, it is the jury's duty to govern their verdict according to their belief.

Of course, the jury's belief cannot go beyond the bounds of the evidence, but within the boundaries of the evidence produced on the part of the plaintiff and the defendant. It is not only the jury's right but the jury's duty to believe what they do believe, and to bring out a verdict in accordance with that belief.

Now, gentlemen, is there any further suggestion which you have to make to the Court?

Mr. Quinn: No.

Mr. Offutt: No.

The Court: The jury can retire.

(Thereupon, at 10:20 o'clock a. m., the jury retired to consider its verdict, which at 11:15 o'clock a. m. was announced by the foreman as being for the plaintiff, in the sum of \$7,500.)

416 *Stipulation Designating Record on Appeal*

Filed December 9 1940

* * *

It is hereby stipulated by and between counsel for the plaintiff, William F. Traynor, and counsel for the defendant, Nu Car Carriers, Inc., a Corporation, parties appellee and appellant, respectively, in an appeal to the United States Circuit Court of Appeals for the District of Columbia from this Court, that the record on appeal shall contain the following:

1. Declaration, filed August 2, 1937.
2. Motion for security for costs, filed September 15, 1937.
3. Plea, filed September 20, 1937.
4. Affidavit supporting inability to furnish security for costs, filed September 22, 1937 (photostatic copy).
5. Demand for jury trial, filed October 18, 1938.
6. Amendment to declaration, filed November 7, 1938.
7. Pretrial order, filed September 27, 1939.
8. Verdict, filed October 26, 1939.
9. Motion of defendant to set aside verdict and judgment in favor of the plaintiff and for a new trial, affidavits of

Henry S. Ambler, Henry I. Quinn and J. Newton Baker in support thereof, as also photostatic copy of driver's exoneration form, all filed November 4, 1939.

10. Order overruling motion, filed December 11, 1939.
11. Notice of appeal, filed December 29, 1939.
- 417 12. Memorandum supersedeas bond, filed December 29, 1939.
13. Memorandum of extensions of time to file record.
14. Transcript of testimony.
15. This stipulation designating the record.

HENRY I. QUINN
Attorney for defendant.

EUGENIO M. FONBUENA
DORSEY K. OFFUTT
Attorneys for plaintiff

418 District Court of the United States for the
 District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 417, both inclusive, (excepting the transcript of testimony, as to the accuracy of which counsel have stipulated), to be a true and correct transcript of the record, according to stipulation of counsel herein filed, copy of which is made part of this transcript, in cause No. 89233 at Law, wherein William F. Traynor is Plaintiff and Nu Car Carriers, Inc., (a corporation), is Defendant, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of December, 1940.

(Seal) C. E. STEWART,
 Clerk.

Endorsed on Cover: No. 7797. Nu Car Carriers, Inc., Appellant, vs. William F. Traynor. United States Court of Appeals for the District of Columbia Filed Dec 10 1940 Joseph W. Stewart, Clerk

BRIEF ON BEHALF OF APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 7797

NU CAR CARRIERS, INC. (A CORPORATION),
Appellant,

v.

WILLIAM F. TRAYNOR, *Appellee.*

HENRY I. QUINN,
Attorney for Appellant,
637 Woodward Building,
Washington, D. C.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 7797.

NU CAR CARRIERS, INC. (A CORPORATION),
Appellant,

v.

WILLIAM F. TRAYNOR, *Appellee.*

BRIEF ON BEHALF OF APPELLANT.

JURISDICTIONAL STATEMENT.

Jurisdiction in this Court is vested by Section 226 (1924), Title 18, Section 26 (1929), of the District of Columbia Code.

STATEMENT OF CASE.

This is an appeal from the judgment of the District Court on a verdict of the jury in a suit for personal injuries, in which appellant was the defendant, and appellee was the plaintiff. Hereafter the parties will be referred to as appellant and appellee.

In the District Court, the appellee introduced evidence to establish that on the 17th day of October, 1936, the tractor-trailer truck of appellant collided with his automobile in the State of Maryland, at the intersection of Conowingo Road and Broadway Avenue, and that he received certain injuries and suffered certain financial losses by reason thereof. Appellee's automobile was traveling from Philadelphia to Washington and just before the collision was proceeding in a Southerly direction towards Baltimore on the Conowingo Road. He offered evidence to prove that as he was making a right hand turn from Conowingo Road into Broadway Avenue the appellant's truck came across the center of Broadway Avenue and collided with his automobile with great force. The appellant contended, and offered evidence to prove, that its truck was on the right side of Broadway Avenue, very close to the curb, when appellee's automobile, traveling at a too rapid rate of speed, attempted to make the turn into Broadway Avenue, skidded on the wet roadway, was thrown out of control, and that the left side of the said automobile collided with the front of appellant's truck with such force as to leave the imprint of the headlights of the truck in the side of appellee's automobile. The tractor of appellant's truck was so badly damaged that it could not be operated under its own power, but after a wheel on appellee's automobile had been replaced it was operated under its own power until it reached a point near Halethorpe, Maryland.

There was a sharp conflict in the evidence upon the main issue of negligence but evidence was introduced on behalf of appellant through the medium of the report of investigating officer, the docket of a Justice of the Peace, and the testimony of appellant's driver, that the plaintiff, shortly after the accident plead guilty to a charge of reckless driving, paid a fine of \$1.75, and told the Justice of the Peace, if the street had not been wet he could have made the turn. Evidence was further offered to show that the plaintiff had signed an exoneration blank by the terms of which he exon-

erated the driver of appellant's truck from all blame or negligence in connection with the accident. The Court refused to permit counsel for appellant to establish the loss of the original exoneration form claimed by it to have been signed by the appellee, as the basis for introducing a copy of the same or secondary evidence of its contents. The jury returned a verdict of \$7500.00 against the appellant. (R. 9.) A motion for a new trial was filed and overruled. (R. 10-17.)

STATEMENT OF POINTS.

1. The Court erred in refusing to permit certain evidence to be introduced on behalf of appellant.
2. The Court erred in making certain remarks and comments concerning the evidence, a witness and argument of counsel for the defendant, all of which were prejudicial to the appellant.
3. The Court erred in refusing to grant appellant's motion to withdraw a juror because of the prejudicial conduct and remarks of the Court.
4. The Court erred in overruling appellant's motion for a new trial.

SUMMARY OF ARGUMENT.

1. The Court erred in refusing to permit appellant to prove the loss or disappearance of the original exoneration statement signed by the appellee, and in refusing to permit the introduction of a copy of the same or other secondary evidence of its contents.
2. The Court erred in denying appellant's motion to withdraw a juror and declare a mistrial because of the prejudicial remarks and comments of the Court concerning the evidence, and to and toward counsel and witness.
3. The Court erred in overruling appellant's motion for a new trial.

ARGUMENT.

1. The Court erred in refusing to permit appellant to prove the loss or disappearance of the original exoneration statement signed by the appellee, and in refusing to permit the introduction of a copy of the same or other secondary evidence of its contents.

The accident of which appellee complained occurred on the 17th day of October, 1936, at the intersection or near the intersection of Conowingo Road and Broadway Avenue, in the State of Maryland. The appellee and his son testified that they were traveling in a southerly direction on Conowingo Road, and appellant's truck was proceeding in a northerly direction on Broadway Avenue; that appellee operated his car carefully and at a speed of about eighteen miles per hour, in making a right hand turn from Conowingo Road into Broadway Avenue, at all times keeping to the right of the center of the road; that appellant's truck was negligently operated so that it crossed over the center of the road on to the wrong side and collided with appellee's automobile. Appellant's driver on the other hand contended that he was operating the truck close to the right-hand curb of Broadway Avenue and that the appellee attempted to make a quick turn into Broadway while traveling too fast which caused his automobile to skid on the wet roadway over to the truck's side thereof, and that the left side of appellee's automobile crashed into the front of the truck. Evidence was also introduced on behalf of appellant to show that the appellee has pleaded guilty to a charge of reckless driving before a Justice of the Peace shortly after the accident, had paid a fine of \$1.75, and had stated that he would have made the turn if the roadway had not been wet. Appellee and his son claimed that appellee was not in condition, physically or mentally, to understand what was going on before the Justice of the Peace, and the son testified that he paid the fine with money which he got from his father's pocket, and agreed to have the father enter a plea of guilty

so that he could immediately take him to Washington for medical attention.

The testimony of the appellee and his son, in which they sought to evade the force of the plea of guilty before the Justice of the Peace by the claim that he was unable to understand what was going on, and their denial of his signing of a statement exonerating appellant's driver of negligence, made it important to have revealed to the jury all the facts concerning that paper and the inability of appellant to produce it at the trial. To permit them to deny and appellant's driver to assert its execution, and then refuse appellant the opportunity to explain its failure to produce it, was bound to cast suspicion on the testimony of its employee. The likelihood of suspicion being aroused and credibility being destroyed was made almost a certainty by the attitude of the trial Justice, whose solicitude for the appellee, and his son, was in striking contrast to his disparagement of appellant's driver and counsel for appellee. This attitude of the trial Judge will be touched upon more specifically hereafter.

Not being able to produce the original exoneration form signed by the appellee counsel for appellant attempted to lay the foundation for the introduction of secondary evidence as to its contents. Although at first the trial Judge permitted the driver of appellant's truck, Emmert, to describe the paper and give the substance of its contents, on assurance from appellant's counsel that proof would be produced that the original paper could not be found, (R. 174) he almost immediately condemned the testimony as to the substance of its contents as a "conclusion" and rejected the testimony. (R. 200-201.) Appellant proved that Emmert had turned the original exoneration form signed by appellee over to a Mr. Westcott, at appellant's Chester office, and then called Westcott and a Mr. Haywood, another employee of appellant, and tendered the testimony of other witnesses, to show that the exoneration form had been turned in as stated by Emmert, what became of it thereafter, what search was made for it, and the reason why it could not be produced. (R. 204, 205, 212, 213, 214 and 215.)

The Court ruled that the tendered testimony was inadmissible, because it was hearsay, and the driver of the truck was unable to state what was in that paper that he claimed the appellee had signed. (R. 215.) The tender was of testimony to prove that the exoneration form signed by appellee went from the Chester office of appellee to the office of an insurance investigator in Philadelphia; that the said investigator made a copy of the original and sent the original to the home office of the insurance company having the coverage on appellant's truck; that the insurance company went into bankruptcy, and the receivers of the insurance company could not find the paper. Tender was also made to prove by the copy and the testimony of Emmert that the exoneration form signed by appellee stated, "I hereby exonerate driver, George Emmert of the Nu Car Carriers, from all blame or negligence in connection with an accident involving the undersigned at Bel Air, Maryland, on this date. 10/17/36" (R. 204, 205, 214 and 215.)

The action of the trial Court in refusing to receive this testimony was manifest error, prejudicial to the appellant. It is so well established that secondary evidence of the contents of a writing is admissible, upon satisfactory proof of the loss of the original, that citation of many cases is not deemed necessary. See *Gilford Granite Co. v. Harrison Granite Co.*, 23 Appeals D. C. 1, 24, and *Chalvet v. Houston*, 43 Appeals, D. C., 77, 80, and 81. In this case execution of the paper by the appellee was established. Proof of its loss and secondary evidence of its contents were tendered, and rejected. Rejected, not because any of the preliminaries necessary in laying the foundation for the introduction of secondary evidence had not been observed, but because the Court erroneously conceived that the tendered testimony of the various witnesses as to the copying of the original paper, search that was made for the original etc., was "hearsay", and because, as he claimed, the driver of the truck was unable to state what was on the paper which the appellee signed. (R. 250.) The tender, and rulings of the Court,

appear at (R. 204, 205, 206, 212, 213, 214 and 215). The final tender and final ruling of the Court were as follows:

“Q. Mr. Haywood, did you make a search at anyone’s request to find a copy of an exoneration report?

The Court: Mr. Quinn, as I understood it, you made your offer when the jury was out. The Court is prepared to rule on that offer. The testimony is not admissible, because it is hearsay, and therefore the Court cannot permit you to proceed with this witness.

Mr. Quinn: What portion of the testimony is it that your Honor rules is hearsay?

The Court: The portion of the testimony which you offered while the jury was out, what you said you would produce while the jury was out, and if this is a part of it, the Court rules that all of that is inadmissible, because it is hearsay testimony.

Mr. Quinn: As to this witness, it is just testimony that—

The Court: Is it a part of your offer? Is this witness a part of your offer?

Mr. Quinn: Oh, yes.

The Court: Then I cannot admit it.

(The following proceedings were thereupon had at the bench, out of hearing of the jury:)

Mr. Quinn: In order to account for the absence of the original, counsel has to show what steps were taken to locate the original paper, placing it where he first stuck it and the steps taken after that. I propose to show by this particular witness—

The Court: This is all hearsay testimony.

Mr. Quinn: No, it could not be hearsay.

The Court: It is all hearsay testimony except the testimony of the man that saw it signed. He could have signed the paper himself so far as the people in Chester are concerned.

Mr. Quinn: But you have every link forged. The boy says that this paper which they signed he turned in—

The Court: But he does not know what was in the paper.

Mr. Quinn: He knows in substance; it exonerated him from blame.

The Court: The Court is prepared to rule. The Court has no doubt about it.

Mr. Quinn: I propose to show by this man—

The Court: You made your offer. If you want to make a further offer—

Mr. Quinn: This will take but a second—to show by him that he made a search at the Alexandria office, that he got in touch with the Chester office, and had them make a search there—

The Court: The Court has ruled on it. If you want to make a further offer, let the jury go out. I do not want anything more said before this jury that the Court has ruled on. That was what the jury was sent out for, so that you could make your offer, and you made your offer, and the Court is prepared to rule that it cannot admit the testimony.

Mr. Quinn: May I then right here, without waiving any rights my client may have, say that I also propose to tender the testimony of Mr. Smith, that he caused a search to be made—

The Court: You made that in your tender.

Mr. Quinn: I want to name the witnesses. I said in general what I proposed to show, and I intend to bring the witnesses. Mr. Smith traced it through the Chester office to an investigator in Philadelphia, that the investigator made a copy of the original and sent the original to the home office of the insurance company, that the insurance company went into bankruptcy, and the receivers appointed by the court—

The Court: If I were counsel on the other side, I would object to that.

Mr. Quinn (continuing): And that the receivers of the insurance company cannot find it. I do not give a continental damn about “insurance company.” The jury knows about it.

Mr. Offutt: They brought out an insurance card. I have no objection to that portion.

Mr. Quinn: Who brought it out? Will you admit that the original went to the insurance company, and that the insurance company failed?

The Court: Oh, no.

Mr. Quinn: I propose to show—

The Court (continuing): If it is objected to the Court won't admit it.

Mr. Offutt: I object to it.

The Court: The Court won't admit it.

Mr. Quinn: I propose to show—

The Court: You made all of this tender. It is already in the record.

Mr. Quinn: I am just being doubly safe about it; that is all. A little precaution does not hurt.

The Court: The Court has ruled on it, and won't permit you to proceed.

Mr. Quinn: And is it understood that the same ruling would go to Mr. Smith, and to every witness—

The Court: The ruling is on your tender, and that is all that the Court has to say about it; and the ruling, Mr. Reporter, made on Mr. Quinn's tender when the jury was absent, that the testimony is not admissible is based on two legal principles, one that the testimony is hearsay, and, second, that the witness in chief, the driver of the truck, was unable to state what was on the paper which he stated the plaintiff signed."

Without further argument on this point it is respectfully submitted that the action of the trial Court was arbitrary, erroneous and highly prejudicial to appellant.

2. The Court erred in denying appellant's motion to withdraw a juror and declare a mistrial because of the prejudicial remarks and comments of the Court concerning the evidence, and to and toward counsel and witness.

Anyone who has had the slightest experience in the trial of jury cases knows and appreciates the effect that the "lightest word or intimation" of the trial Judge has upon the jury. His comments in the presence of the jury, concerning witnesses or counsel, may determine the verdict. There is nothing more important in the administration of justice than to have the jury free to render its verdict uninfluenced by utterances of a trial Judge intended or tending to discredit witnesses or counsel. He should not be permitted by such utterances to influence a jury in determining the question of their credibility or the weight that should be given to their testimony.

In the case of *Ruppert v. Wolf*, 4 D. C. Appeals, 556, 562, this Court in an opinion by the late Justice Morris, eloquently stated the duty of the trial Judge, as follows:

“These comments of our highest and most honored tribunal we must regard as appropriate to the case before us and as controlling our decision. It is the duty of Courts to protect witnesses and litigants from insolent abuse and violent denunciation, in which counsel are too often inclined to indulge. Innocent parties are often required to go into court against their will; and witnesses may almost always be presumed to be there under compulsory process. It would be a disgrace to our jurisprudence if counsel are to be allowed, with impunity, to subject them to insult and contumely. Much more is it the duty of the presiding judge to refrain from the expression even of harsh comment. There may often be developments before him sufficient to excite his indignation as a man; and possibly the case now before us may have furnished such an occasion. But even in such cases a witness is entitled to the protection of the law, and to immunity from violence. A person may be competent to testify as a witness and be compelled by process to appear as such, who has been convicted of crime; and it does not necessarily follow that his criminal conduct should discredit him with the jury. Certainly it does not follow that the presiding judge should by his own emphatic utterances seek in advance to discredit him with them, and thereby unduly to influence their determination of the question of his credibility.”

In *Starr v. U. S.*, 153 U. S. 614, Mr. Chief Justice Fuller, speaking for the Supreme Court, said:

“It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may prove controlling. *Hicks v. United States*, 150 U. S. 442, 452. The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an

independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances." * * *

"These expressions are qualified to some extent by other parts of the charge, which we cannot give at length; but we are constrained to express our disapprobation of this mode of instructing and advising a jury. Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same everywhere, and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them."

It might well be that one comment or action of the trial Judge might not tend by itself to influence the jury improperly and would not in and of itself constitute prejudicial error. But in this case there were a number of comments of the trial Judge with reference to a witness and counsel, the cumulative effect of which was bound to be prejudicial. This Court, in *Egan v. U. S.*, 52 Appeals, D. C., 384, 397, recognized this tendency, when it stated:

"Numerous other exceptions were noted to the conduct of the trial judge in ruling upon the admissibility of evidence and commenting thereon in the presence of the jury. In other words, these exceptions challenge the demeanor of the judge toward defendant. While there is perhaps no single instance involving error so prejudicial as to warrant reversal, we are convinced that, considered as a whole, the rights of defendant were so prejudiced thereby as to deprive him of that fair and impartial trial which the Constitution and the law of the land accords to every citizen accused of the commission of crime. The trial judge should be so impartial, in the trial of a criminal case, that by no word or act of his may the jury be able to detect his personal convictions as to the guilt or innocence of the accused."

See also:

Sprinkle v. Davis, 111 Fed. (2d) 927, 128 A. L. R. 1101.

In the light of the decisions referred to above consideration is asked of the various incidents and comments against which complaint is made, the last of which was the action of the Court in interrupting counsel for appellant in his argument to the jury, attempting to destroy the force of counsel's argument, and stepping from the role of Judge into that of advocate for the appellee. It is apparent from the record that counsel for appellant sought to proceed with the trial, and have it completed without a mistrial, if possible, but becoming convinced that the last offense of the trial Judge, during the argument of counsel, was more than likely, taken with that which had gone before, to unduly influence and prejudice the jury, he moved the Court to withdraw a juror and declare a mistrial because of the prejudicial actions and statements of the Court. This motion was overruled.

When we search the record we find that the Court was at all times solicitous for and courteous to appellee and his son, and permitted them frequently to give hearsay testimony. Never once did he by word or action indicate any criticism of or impatience toward them. On the other hand, without the slightest justification, it is respectfully submitted, he indulged in comments in the presence of the jury towards appellant's driver and appellant's counsel the tendency of which could only be to disparage and belittle them in the eyes of the jurors. The incidents of which complaint is made, and which were the basis of the motion to withdraw a juror are as follows: The appellee on direct examination testified as follows:

"Q. Did you know that that curve was there?

A. Yes, sir.

Q. What was the condition of the roadway at the time?

A. Well, it was fair. It had been a little damp in the morning when we started out, but it seemed to be very fair at the time of the accident. It did not seem to be wet or raining at that time." (R. 31.)

On Cross-examination the following occurred:

“Q. Do I understand you to say it was a dry road?

A. It might have been a little damp.

Q. Didn't you say on direct examination that it was dry?

A. Yes, it was fair, dry. It had been raining; I verified that. It had been raining, but by the time we got there it was cleared up.

Q. How soon before this accident had it stopped raining?

A. Quite a ways down the road.

Q. Don't you know it was a drizzling rain just as you approached that intersection, and the road was wet?

A. Do I know it?

Q. Yes.

A. No, sir; I did not see it rain.

Q. Was the road wet?

A. The road might have been a little damp.

Q. Why didn't you tell the jury that at first, when you said it was dry?

The Court: Mr. Quinn, I think his testimony corresponds to his testimony in chief.

Mr. Quinn: My impression was that he said it was dry.

The Court: No, he did not testify it was dry.” (R. 58).

On Cross-examination of appellee's son we find the following:

“Q. You had been to a doctor at Bel Air, hadn't you, Dr. Davis?

A. That is right.

Q. And did not Dr. Davis say that there was not anything seriously wrong with your father?

A. Yes, but I was not satisfied with that.

Q. He did say that?

Mr. Offutt: Let him finish.

The Court: I would give him ample time. The witness, as far as I can tell, has probably never been in a court room before.” (R. 96.)

Again on Cross-examination of appellee's son the following occurred:

"Q. Did your father shove out the clutch pedal at the time he put his foot on the brake?

A. No, sir. The reason I can tell you that is because he taught me to drive, and he always taught me to leave the clutch—

Q. No—

A. (continuing) —out until you come to a complete stop.

The Court: All right; proceed. Do not interrupt him. If the answer is not satisfactory, you can move to strike it out.

Mr. Quinn: I object to the answer.

The Court: I know you do, but the answer in my opinion is responsive to your question. You asked that question many times, and the boy is trying to answer you.

Mr. Quinn: My question was about his father shoving out the clutch pedal at the time.

The Court: And he is trying to explain the fact to you, as far as he knows, exactly what his father must have done, because his father taught him to do the same thing.

Mr. Quinn: That is just what I object to.

The Court: I know you do.

Mr. Quinn: It is not what the father must have done.

The Court: I understand that, but I think his answer is responsive, and I will admit it.

Mr. Quinn: Then I move to strike it out." (R. 106-107)

In the cross-examination of a colored physician, Doctor Warfield, he was questioned by counsel concerning a report that he had made on an examination of the appellee. The purpose of the cross-examination was to develop that the appellee was not seriously injured, and that most, if not all, of his trouble was imaginary and due to his own mental suggestions. The Court interrupted the cross-examination, with comments, whose only tendency could be to influence the jury against the progress of the cross-examination, and, in fact, the Court injected his own testimony into the case

by telling of the two thousand cases of War Veterans which came before him when he was a member of Congress and asserting as a fact that in all those cases you could find no objective symptoms but their nervous systems were simply destroyed.

The Cross-Examination and the comment of the Court was as follows:

“Q. Do you doctors also have a term known as ‘litigation neurasthenia’?”

A. I do not recall it.

Q. Havent you recalled that discussed in the medical profession?

A. I do not know that I can answer that.

Q. The type of neurasthenia that disappears when the litigation is over, win or lose?

A. Yes, I have heard of that.

Q. And you have found in your medical practice, haven't you, that there is such a thing as litigation neurasthenia?

A. Well, I think so—not necessarily neurasthenia, but any other condition.

Q. It is a condition that clears up when the litigation is over, whether the man wins or loses.

A. Yes, I have heard of those things.

Q. You say at the conclusion of your report—

‘I take the view that, for the most part, a physical disturbance, due to the injury and arising from suggestion, is the main abnormal condition, which may run an indefinite period.

What do you mean by the term, ‘arising from suggestion’?

A. Well, that is a suggestion of his own. He has had an injury, and he suggests within himself.!

Q. Has that any connection with the litigation neurasthenia I have been talking about?

A. Not that I know of.

The Court: That is, more clearly, like shell shock.

Mr. Quinn: Well, it may or may not be, your Honor.

The Court: What the doctor is testifying to is.

Mr. Quinn: I do not know about that. He speaks about it being a psychical disturbance.

The Court: That is what shell shock is.

Mr. Quinn: I have always understood—

The Court (continuing): And when I was in Congress, I had over two thousand cases where you could not find an objective symptom to save your life, and here were these men whose nervous symptoms were simply destroyed, and without any objective symptoms.

Of course, I am not undertaking to say anything about whether he had litigation neurasthenia or otherwise, but I am just undertaking to tell you what the doctors—" (R. 145-146).

It is well to contrast the attitude of the Court toward the appellant's driver with his attitude toward the appellee, and his son. Never once did the Court by word or action indicate anything but approval of their testimony. Never did he inject into the case while they were on the witness stand any comment or question of his own that would convey to the jury the thought that he disbelieved their testimony or considered it of little weight. However, he loses no opportunity by question and comment to disparage or discredit appellant's driver. Thus we find the following occurred when the driver, Emmert, was testifying:

"Q. Did you at any time approximate the speed at which the car was traveling before it crashed into your car?

A. The car was going at a pretty good rate. I would not know what speed it was going. There was no time to judge it.

Q. Did you at one time estimate that speed at 30 miles an hour?

A. I would say he was going that fast, yes.

By the Court:

Q. When you were facing the car, you were going one way and the car the other, and you only saw it for 15 feet, you are able to estimate its speed?

A. Not definitely, no, sir. I thought it was going at a good rate of speed." (R. 186-187.)

The above quoted question by the Court was argumentatively framed so that it was bound to convey the idea to

anyone who heard it that Emmert's testimony as to the approximate speed of appellee's car was preposterous and unworthy of belief. And again, in less than five minutes, the Court undertook to attack the value of Emmert's testimony by the following:

"The Court: Has anybody measured since yesterday the distance from the end of this rail here to the top of the front bench?

Mr. Offutt: No. I tried to get Mr. Quinn to do it, but after we suspended—

Mr. Quinn: Tried to get me to do it?

The Court: If the witness' idea of distance is—if he is not able to estimate distance any better than yesterday, I do not see that his testimony as to distance is of much benefit because I do not know how far it is—I should think it was nearer 40 feet than 20." (R. 188.)

The truth was that the witness had not said that the distance was exactly 20 feet but had said 20 some feet. (R. 181.)

And again we find the Court making statements which would disparage the witness in the eyes of the jury, and in so doing he, himself, unwittingly misrepresented the evidence. It is well known that witnesses can honestly be mistaken under the circumstances of an accident, when they undertake to fix exact distance or speed, and they frequently hesitate to attempt to do more than approximate the distance or speed. Because of this well known fact it does seem to us that the trial Judge was going out of his way to belittle this witness in the eyes of the jury on the question of a few feet or more, and in so doing he, himself, was guilty of an inaccuracy. However, because of his exalted position in the eyes of the jurors, they would be unduly influenced by his contention. The incident complained of was as follows:

"Q. What is your best judgment?

A. The best I can judge is that he had not reached, in my opinion, the center of the intersection before he started to slide.

The Court: Yesterday you said he had reached the center of the intersection before he began to turn the wheel.

The witness: No, sir; the mark over there would indicate it.

Mr. Quinn: Put the mark where it was. It is not the center of the intersection.

The Court: He was asked specifically whether it was in the center, and he said yes." (R. 193.)

When we turn to the witness' testimony the day before, which is found on page 185 of the record, in answer to the specific question of the Court as to whether he was "about half-way through the intersection" the witness stated, "that is about it, yes. I thought he was going straight for a moment, straight across, and then, as he neared the center, very nearly the center of the intersection, he turned the wheel sharply to the right."

The apparent hostile and critical attitude of the Court toward appellant's case as shown by the foregoing colloquies with and comments on the witness Emmert, was further emphasized in his unjust criticism of counsel for appellant, which criticism tended to belittle him in the eyes of the jury as being guilty of sharp practice. The incident referred to was as follows:

"Q. Mr. Westcott, did you see Mr. Emmert again?

A. I saw him after I came back in to Chester.

Q. When was that?

A. That was somewhere about four and a half hours after the accident.

Q. Was any report made to the Chester office concerning this accident?

A. Yes, sir.

Q. Did you see that report?

A. I did.

Q. Was there any other paper with the report?

A. There was a card that he had to turn in—every accident they have to get a card and make out a report of the accident, and get witnesses if they can possibly do so.

Q. Was this cardboard or paper thick paper or just paper? What was it you referred to?

A. Well, it is a card about the thickness of a postal card.

The Court: Did you see the card that day?

The witness: I did, yes, sir.

The Court: Proceed.

By Mr. Quinn:

Q. What is that card called?

A. Well, it is a card, if you are not at fault in the accident you can get the people involved in the accident to sign that and clear you. It is for your benefit in retaining your job.

Q. Was that card signed by anyone?

A. It was signed, yes, sir.

Q. Who turned in the card?

A. Mr. Emmert turned it in to me.

Q. That is the driver of the tractor involved in the accident?

A. Yes, sir.

The Court: Did you see the card signed?

The Witness: I did not see the card signed.

The Court: Your testimony is not admissible.

Mr. Quinn: I propose to show, following up the testimony of the driver, Emmert, that he got this man to sign the blank which he said exonerated him from blame, that he turned it in at the office—he turned it in to this man, and that this man saw the blank signed just the way Emmert says it was signed.

The Court: You know that that is not admissible, and that statement is not properly to be made to the jury, and the Court will not admit the testimony.

Mr. Quinn: In order to save the rights of my client—

The Court: You know and I know that this man cannot testify that the plaintiff signed a paper unless he saw it signed.

Mr. Quinn: I am not asking him to say that. He simply said that he saw the paper. I am following it up step by step.

The Court: But unless you are ultimately able to establish the fact that he saw the paper signed, these further steps are not proper, because it is getting something before the jury that should not be gotten before it.

Mr. Quinn: I propose to show that this boy did what he claimed he did, and turned it in to this man, to account for the loss of the original.

The Court: In the first place, you have not established what is in the paper yet, and have not established a thing about it, except this boy's conclusion. This testimony is clearly not admissible, Mr. Quinn.

Mr. Quinn: I am making the tender, and the purpose of making it is this, simply to comply with the requirements of the Court of Appeals, and that is that if I make an offer of evidence, I have to apprise the lower court as to what I expect to prove; and that I am doing."

The prejudicial conduct of the trial Judge, finally reached its culmination when he interrupted counsel for appellant, in his argument to the jury. Because of his questions and comments which tended to place counsel in the position of misrepresenting the testimony, and to belittle the witness, Emmert, in the eyes of the jury, counsel for the appellant undertook in his argument to go to the record and read therefrom in order to put the witness, Emmert, and counsel in the proper light before the jury. He was immediately interrupted by the trial Judge, who undertook to argue with counsel for the appellant and thus to the jury, that counsel's argument on the evidence as read from the record was not sound. Counsel in his argument stated that the evidence might not be of great importance in the case but that he did not want to be put in a position of misrepresenting what the witness had said, and it was for that reason that he had gone to the record. The Court did not disclaim any intention of putting counsel in that position, but by his argument, questions and statements immediately thereafter undoubtedly left the inference with the jury that counsel had misrepresented the testimony of the witness. His conduct in this respect did not indicate a judicial temperament, and it is respectfully submitted that he departed thereby from his judicial position and became an advocate for appellee. This was followed by another interruption and argument by the Court, concerning the testimony of Emmert. The portion

of the argument and the interruptions and comments of the trial Judge to which reference is made appear in full on pages 227-231 of the record, and will not be set forth herein. After the arguments were concluded, and before the charge of the Court and the submission of the case to the jury, counsel for the appellant moved to withdraw a juror and to declare a mistrial because of the actions and statements of the Court which have been referred to herein. This motion was overruled, and we submit most earnestly that it should have been granted. One cannot read this record without feeling that the flimsy case presented by appellee resulted in a verdict favorable to him principally because the jury was unduly influenced by the improper conduct of the trial Judge as hereinbefore set forth.

3. The Court erred in overruling appellant's motion for a new trial.

It was error for the trial Court to overrule appellant's motion for a new trial. Under the circumstances of this case his action constituted an abuse of discretion. By his own erroneous rulings he had refused to permit appellant to establish the loss of the exoneration form signed by appellee and to introduce secondary evidence of its contents. The affidavits in support of the motion for a new trial showed conclusively that the plaintiff had signed the exoneration form referred to in the first section of this brief, and explained the reason why appellee was not able to produce it at the trial of the case. The appellee filed no counter-affidavits and because of his failure to do so the affidavits in support of appellant's motion for a new trial must be taken as true. *Harris v. Wall*, 144 Va. 174, *Powell v. Commonwealth*, 133 Va. 756, 33 A. L. R. 541. By a comparison of the signature "Wm. Traynor," appearing on the photostatic copy of the driver's exoneration form (R. 13), with the signature "William F. Traynor" appearing on the affidavit filed by appellee in the lower Court on September 22nd, 1937, any reasonable person will be convinced, not only that

the same person wrote both signatures, but that the signature on the exoneration form was not written by a man who was mentally unable to understand what was going on, and physically unable to extract money from his pocket. This original exoneration form was not only evidence to contradict and impeach appellee, and his son, but it was substantive proof of a fact which, if it had been before the jury, would undoubtedly have produced a different verdict. Request is now made that this Court examine the original exoneration form, and the signature thereon, and the affidavit referred to above, and the signature thereon, these two papers being in the custody of the Clerk at the District Court. It is difficult for one who makes such a comparison to reach any other conclusion but that the plaintiff, and his son, were guilty of deliberate perjury when they denied the signing of the exoneration form.

In *Harris v. Wall*, 144 Va. 774, 779, the Court said:

“The evidence introduced in support of defendant’s motion to set the verdict aside because of after discovered evidence consists principally, if not entirely, in cancelled checks which had been paid by Downtin to the plaintiff during their dealings over a period of about eleven months, and which Wall swore he had not received, except probably two; his contention before the jury being that the defendant had paid him for the goods furnished Downtin with his, (Harris’) own checks, drawn and payable directly to plaintiff, Wall, whereas the cancelled checks with Walls’ endorsement on the back show that the checks referred to were not drawn by Harris, payable to Wall, but were payable to Downtin, and by him endorsed to Wall whose signature appears on the back of each of them as an assignee in due course of Saul Downtin. It is manifest that the checks as exhibited go a long way in sustaining the contention of the defendant as made on the trial, that Wall dealt with Downtin and not with Harris.

The damaging testimony as set out in the affidavit of the defendant accompanying his motion for a new trial was unchallenged by any counter-affidavit on the part of the plaintiff, and as was observed by Judge Sims

in the case of *Powell v. Commonwealth*, 133 Va. 756, 33 A. L. R., 541, where there is no counter-affidavit as to the perjury of the plaintiff the affidavit of the defendant must be taken as true.

To allow a verdict to stand under this state of the record would at least have the appearance of lending the Court's aid to a litigant who has secured a verdict and judgment by testimony, the bona fides of which is open to the gravest suspicion."

In 46 C. J. page 270, under the caption "Primary Evidence" the law is stated to be:

"A new trial may be allowed where an important document or book, which was lost at the time of the trial and was not found on diligent search, has been discovered since, and the evidence as to its execution or contents was seriously conflicting. Ordinarily movant must have offered secondary evidence of the document or book and sufficiently excused the production of the original."

A number of State cases are cited in the notes in support of the above text.

In this case appellant had tendered proof concerning the loss of the original document, the search for the same, and offered secondary evidence of its contents after tendering proof which was amply sufficient to excuse the production of the original, but the trial Judge refused to receive such evidence. As heretofore pointed out, the tendered evidence would have shown that the insurance carrier that had the coverage on appellant's truck had gone into bankruptcy, that prior to its bankruptcy its agents had investigated the accident in question and during that investigation there had been turned over to its investigator the original of the exoneration statement; that the investigator, an attorney in Philadelphia, had made a copy of the original exoneration form and sent the original to the Home Office of the Insurance Company, and Mr. Smith, of the firm of Cook and Markell, Attorneys in Baltimore, Maryland, had made inquiry of the Superintendent of Insurance

in New York who had taken over the affairs of the Auto Mutual Indemnity Company, as receiver, concerning the original exoneration form and had been informed by the Superintendent of Insurance that it could not be found in the files. It was proposed to introduce in evidence the testimony of the driver as to the contents of said exoneration form to the best of his recollection, and the copy of the same that was made by the investigator in Philadelphia. Every necessary preliminary proof as to the loss of said exoneration form as the basis for the introduction of secondary evidence was tendered, and rejected, leaving the jury without any information as to the contents of the paper, and the reason for the appellant's inability to produce the same and thus subjecting the testimony of its driver, Emmert, to the gravest suspicion. The trial Justice's attitude on that question so gravely damaged the appellant's case that the refusal of the motion for a new trial under the circumstances, was, it is respectfully submitted, arbitrary action on his part.

Very frequently the Courts of this Country have granted new trials where an injustice has been done, and it is not only their right and inherent power but their duty to grant new trials under such circumstances. This is especially true where the unjust verdict is brought about or contributed to by the Trial Judge himself in the respects hereinbefore pointed out in this brief. It is difficult to conceive of a record which presents a stronger case of an unjust verdict and judgment brought about by erroneous action of the Court, and perjury of the witnesses, a verdict and judgment from which appellant is entitled to be relieved. It had paid for insurance protection, its insurance company had failed, and it was obliged at its own expense to defend this case. Its counsel exercised every reasonable diligence to obtain and present to the jury every bit of evidence that had been gathered and developed by the insurance carrier during its investigation of the claim. Having made inquiry at the office of the investigator, and receiver for the insurance company, concerning the original exoneration form, its

counsel were advised that it had disappeared or could not be found. Thus it had made inquiry at every place and of every person where and from whom it could reasonably expect to obtain information, and being unable after these efforts to produce and introduce in evidence at the trial the original exoneration form it tendered proof of the activities of its representatives in this respect in order to get before the jury the best evidence possible of the contents of the document. The grave and prejudicial error of the trial Judge in rejecting the tendered proof is then followed by his arbitrary action in refusing a new trial when the original paper, located after trial, shows beyond question that the unjust verdict had been obtained by testimony which had all the earmarks of perjury, perjury which it was denied the opportunity to combat by the best evidence obtainable at the time of trial. It has lost the insurance protection for which it paid, and, it is respectfully submitted, it was denied the fair and impartial trial to which it was entitled. It comes confidently to this Court for relief.

CONCLUSION.

It is respectfully urged that the actions of the trial Judge in the respects hereinbefore pointed out constitute prejudicial error and the judgment below should be reversed.

Respectfully submitted,

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BRIEF ON BEHALF OF APPELLEE

IN THE
**United States Court of Appeals for the
District of Columbia**

No. 7797

UNITED STATES
COURT OF APPEALS FOR
DISTRICT OF COLUMBIA

FILED NOV 27 1941

Joseph W. Stinson

NU CAR CARRIERS, INC. (A CORPORATION), APPELLANT,

v.

WILLIAM F. TRAYNOR, APPELLEE.

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IN THE
**United States Court of Appeals for the
District of Columbia**

No. 7797

NU CAR CARRIERS, INC. (A CORPORATION), APPELLANT,
v.

WILLIAM F. TRAYNOR, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

Counter-Statement of Case.

The action is for damages sustained by the appellee when a Ford Coupe which he was driving was struck by a tractor-trailer truck owned by and operated on behalf of the appellant. The collision occurred about 7:30 or 8:00 a. m., on the morning of October 17, 1936, at or near the intersection of Conowingo Road and Broadway Avenue on the highway approaching Bel Air, Maryland. On the day of the accident, appellee was driving with his son from Philadelphia to Washington, D. C. The appellant's tractor-trailer, which

was 39 feet in length, was being driven from Hagerstown, Maryland, to Chester, Pennsylvania.

Conowingo Road runs easterly towards Broadway Avenue and merges to the right with Broadway Avenue in a turn of the roads. At the time of the accident, there was a hedge on the right hand side of the Conowingo Road that prevented the appellee from seeing the appellant's trailer and the same hedge also prevented the operator of appellant's truck from seeing the machine operated by appellee (R. 29). The only evidence as to the width of the road where the accident took place was given by the appellee who stated that he had stepped off the road where the accident took place and that it was nine yards in width (R. 33). It had been raining some hours before the accident, but there was a conflict of testimony as to the condition of the road at the time of the collision.

The witnesses to the collision were appellee, his son, and the operator of appellant's trailer truck. The testimony of appellee, and corroborated by his son, was to the effect that the appellee approached the intersection of Conowingo Road and Broadway Avenue, at a speed of about 18 to 20 miles per hour, and their machine was about two or three feet from the center line of the road. That appellee started to make the right turn at the curve of the road branching into Broadway Avenue when appellant's trailer truck, in the act of turning the curve of the road, cut over the center of the road to the side where the appellee was driving and ran into the left side of the Ford Coupe causing the serious injuries to him that followed. Appellee, in making the turn on the curve of the road, first saw the appellant's trailer truck as it came towards his machine, and he quickly turned his machine to the right hand side of the road, but he was unable to avoid the crash that followed (R. 32).

The appellant's version of the accident, as given by its driver, was that while driving north on Broadway Avenue,

he had approached to about 25 or 30 feet to the intersection at Conowingo Road, when he noticed appellee's machine coming out of Conowingo Road, and as appellee neared the center of the intersection, he, appellee, turned the wheel of his machine sharply to the right. The machine started to skid for about four or five feet, and thereupon, the front wheels of appellee's machine seemed to almost set still, and the car pivoted and slid sideways and swung around, striking the trailer truck (R. 168-9).

Following the accident, appellee entered a plea of guilty to a charge of reckless driving before a magistrate, and he was fined \$1.00 and costs of \$.75 and evidence also introduced by appellant was to the effect that appellee had signed an exoneration form or blank, the substance of which exonerated the driver of appellant's trailer truck from blame for the accident (R. 175).

Prior to the accident, appellee had been strong and robust, and had been regularly employed, when employment was available, as a structural ironworker. Following the accident, he lost consciousness, and he was taken to a doctor in the vicinity of the collision on a stretcher in a police car. From the time of the accident, to the day of the trial, some three years later, appellee constantly suffered from the injuries sustained in the accident, and on the day of the accident, he was so badly injured that he had to be carried physically out of the machine in which he was placed, to be driven to Washington, and his condition was such that he had to recline in a chair for a period of three days before he could be placed into a bed (R. 34 to 39).

The appellee had no recollection of having entered the plea of guilty or of having paid the fine, and he had no recollection of having signed an exoneration form (R. 60). His son stated that the fine was paid after a conversation between the son and the Justice of the Peace in order that

appellee would be released from the custody of the Maryland State Police, so that he could be taken to Washington for medical treatment, and as the appellee could not reach into his pockets because of his condition, the son obtained from appellee's pocket the money needed to pay the fine (R. 97).

Upon the evidence showing the foregoing state of facts, the jury returned a verdict for the appellee in the sum of \$7,500.00, for which amount judgment was accordingly entered for appellee.

Traffic Regulations Involved.

In his declaration (R. 2, 3), and in his amended declaration, the appellee charged the appellant with the violation of certain acts of negligence at common law and with the violation of certain statutory regulations of the State of Maryland. It was stipulated between counsel that the provisions of the laws of Maryland pertaining to the regulation of traffic were in force and effect at the time of the accident (R. 137 and 138), and particularly:

Section 194 (1), *Reckless Driving, Speed Greater than Reasonable*. No person shall operate a motor vehicle of any kind, as defined in this subtitle, over any public highway of the State recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property and life or limb of any person.

Section 195, *When Speed is to be Reduced*. Upon approaching any person walking in the traveled portion of any public highway, or a horse or any animal being led, driven or ridden thereon, or a crossing of the intersecting public highway, or a bridge, or a sharp turn or a curve, or a steep descent, and also in passing such person or such horse or other animal approaching or traveling such crossing, bridge, curve, or descent, the person operating a motor vehicle shall have the same control and shall reduce the speed to a reasonable and proper rate.

Section 209, *Keeping to Right on Highways*. All vehicles, motor, horse-drawn or otherwise, when being driven upon the highways of this State shall at all times keep to the right of the center of the highway upon all highways of sufficient width, except upon streets or roads where traffic is permitted to move in one direction only, and except where overtaking and passing another vehicle, and unless it is impracticable to travel on such side of the highway, and in rounding curves shall keep as far to the right of the center of the road as is reasonably possible.

Summary of Argument.

1. (a) The court correctly ruled upon the tender of evidence by appellant as to how and what he proposed to offer into evidence to establish the loss of the exoneration form and to allow the introduction of a typewritten copy. The tender as made was legally inadmissible because it was based upon hearsay and based upon conclusions of the driver.

(b) Appellant's evidence through one Mr. Westcott showed that the card as established and sought to be shown as lost was not delivered to appellant's office in Chester, Pennsylvania, and appellant was unable to establish on his theory the link necessary to prove the loss of the original.

(c) Appellant, in fact, introduced secondary oral testimony by the driver of the trailer truck as to the substance of the contents of the exoneration paper. The introduction of the typewritten copy of the exoneration form would have been repetition.

(d) The substance of the purported exoneration form was before the jury, and the jury was instructed that they might consider any contradictory statements made or any inconsistent position taken by the parties elsewhere than at the trial, and the refusal to allow the introduction of

the typewritten copy, even if erroneous, was harmless as the copy restated the evidence already testified to by the driver. The mode of proving the claimed loss of the copy as proposed by appellant would indirectly and improperly show that appellant's insurance carrier had gone into bankruptcy.

(e) The fact that the claimed original was found the day following the trial when a renewed effort was made to locate it shows that it was not in fact a lost paper.

2. (a) The court made no prejudicial remark or comment and the appellant was accorded a fair and impartial trial. The trial court acted fairly within the limits of its discretion. No objection was taken to any remark or comment complained of until after the case had been argued by both counsel to the jury and after the case had been fully tried. The court charged the jury that it was the triers of the facts and left the determination of the facts solely to its judgment, and at no time was any substantive right of the appellant affected or denied.

(b) The motion to withdraw a juror and declare a mistrial was not based upon meritorious grounds, and it was not seasonably made. The trial lasted for four days, and the issues were argued to the jury by counsel on the third day. The jury was to be charged by the court on the morning of the fourth day, and on that day prior to the charge of the jury, the appellant first made its objection to any comment or remark, which came too late to be legally effective.

3. (a) The refusal to grant a new trial was within the sound discretion of the court, and there being no abuse of that discretion, the refusal is not grounds of error on appeal. On motion for new trial on the ground of newly dis-

covered evidence, the questions as to whether the original document would probably change the result if a new trial was granted, or if due diligence was used to find the original before and during the trial, or whether it was cumulative to evidence in the record, are matters addressed to the discretion of the trial court and will not be reviewed unless this Court believes there has been an abuse of discretion.

(b) The finding of the exoneration form was not newly discovered evidence, but the substance of the form existed during the trial as evidence, notwithstanding which the jury decided in favor of appellee. The affidavits show that on the day following the trial, a request was made that the paper be looked for and on the same day it was located. Of themselves, the affidavits show that no effort was made to find the paper until more than two years after appellee filed his action and further that due diligence was not used.

4. (a) The action was solely one of a conflict of evidence. The witnesses on behalf of the appellee, as believed by the jury, proved that the operator of appellee's trailer negligently cut across the center of the road at the turn in the curve of the road, thereby causing the accident. Appellant's driver denied crossing the center of the road, and testified that appellee's machine started to skid and slide in such a way as to run into the appellant's trailer truck.

(b) The evidence as presented to the jury, under the proper and fair charge of the court, left to the jury for its determination the question of fact as to negligence of appellant. Under the instructions and charge of the court, the jury was informed that it was their function to determine the facts and the burden was upon appellee to prove the case. The finding of the jury in favor of the appellee supported by sufficient evidence is conclusive under the circumstances.

ARGUMENT.**I.**

The ruling of the Court as to the admission of a copy of the exoneration form was on a tender of evidence by appellant. The court did not err in refusing to admit the evidence as tendered.

The ruling of the Court on the evidence tendered was correct and the appellant failed to have a proper foundation to admit the introduction into evidence of the offered copy.

(a) The operator of appellant's truck was the only witness produced by appellant who had personal knowledge of the execution and of the genuineness of the purported exoneration form. By his testimony, he did not know the contents of the paper and he was therefore unable to identify the proposed copy as an authentic and genuine copy, and the Court in the proper exercise of its discretion refused to permit the introduction of the copy as tendered by appellant,

The appellee on cross-examination did not remember that he had signed a form in which he exonerated the driver of the truck (R. 60). His son, on cross-examination testified that the driver of the truck, Emmert, did not present any paper for him to sign and that his father did not sign anything while he, the son, was with his father (R. 93, 94, 95).

On direct examination of the driver, the latter testified that the appellee had signed a paper for him (R. 173). His knowledge and testimony as to the paper is as follows: (R. 173, 174, 175, 176).

Q. Do you remember what kind of a paper it was? A. Yes, sir.

Q. What was at the top of the paper? A. Exoneration blank.

Mr. Fonbuena: Before he shows him anything, I think he should describe this paper a little more in detail; before Mr. Quinn shows him anything, I believe the witness should testify and show what was signed.

By Mr. Quinn:

Q. What kind of a paper was it?

The Court: First he said it was what was known as an exoneration paper. He had gotten that far. Now proceed.

Q. Describe the paper, just the size of it and what was on it, as far as you can remember. A. It was a paper about the size of the cover of a book.

The Court: He cannot tell what is on it until he first explains the absence of the paper.

Mr. Quinn: Well, I can only take him step by step on it, but I can give your Honor my assurance——

The Court (interposing): You propose to follow this up and show that the paper cannot be produced? Is that the idea?

Mr. Quinn: Yes.

The Court: Proceed, with that assurance.

By Mr. Quinn:

Q. Will you describe the size of the paper? It is a piece of paper a little larger all around than the cover of this (indicating).

Q. The cover of the Bible? A. Yes.

Q. Was it paper, not cardboard or heavy paper? A. It was a heavy grade of paper.

Q. Do you remember what was on the top of the paper? A. "Exoneration Form" or "Exoneration Blank." I don't know exactly which one.

Q. *Do you remember what was in the paper, the words, in substance what was in the paper?* A. Yes, sir, I cannot

word it like it was on the page, but it exonerates the driver—

Mr. Offutt: I object to that.

The Court: I think that the word "exonerates" is a conclusion. I think he said what was on the paper, as far as he can.

Mr. Quinn: The only difficulty is that that is just the word that was used.

The Court: He has already said that it was an exoneration paper. I don't know whether he carries them around in his pocket or not.

By Mr. Quinn:

Q. What about these exoneration forms that you are talking about? Did the men carry them on their trucks? A. Yes, sir.

Q. On this particular day, did you have any in your truck? A. No. Sir.

Q. Where did you get this paper that you got for Mr. Traynor to sign? A. From another driver down the road.

Q. What company did he drive for? A. Anchor.

Q. Did you know the man's name? A. Yes, sir.

Q. Do you know where he is at the present time? A. Last I heard, in Baltimore.

Q. What is his name? A. McLachlen.

Q. And he was driving for the Anchor people? A. Yes, sir.

Q. Did you get a blank from him? A. Yes, sir.

Q. Was that blank in printing? Was it printed with certain little blanks for you to fill in? A. Yes, sir.

Q. *What did that form say as to you?* A. *It said that it exonerated me from any blame in connection with the accident. I don't know how to word it; what it meant was that it relieved me of responsibility.*

The Court: You cannot state that.

By Mr. Quinn:

Q. *What is the substance of it? You said it exonerated you from blame for the accident? Is that right?* A. Yes.

Q. Did Mr. Traynor sign that? A. Yes.

Q. Where was he when he signed it? A. Still in the police car.

Q. Had the justice of the peace concluded his proceedings there? A. Yes.

Q. Had he paid his fine? A. Yes, sir.

Q. What did he sign it with, pen or pencil? A. Pencil.

Q. Did he raise any objection to signing it at all? A. No, sir.

Q. Was his son there at the time? A. Yes, sir.

Q. Seated in the car? A. Yes, sir.

Q. What did you do with that paper then? A. I turned it in with my accident report in Chester.

The testimony continued to the effect (R. 176) that he turned in the report to a Mr. Westcott who took his report of the accident and that Mr. Westcott was at the time assistant service manager, and that the witness had not seen the original of the report since he had turned it in.

On cross-examination (R. 197) he stated that he had gotten the paper from another truck driver who came along after the accident occurred, and in answer to a question by the Court responded that ordinarily he was supposed to have a supply of these papers in his truck.

On redirect examination, the witness testified (R. 200, 201):

Mr. Quinn:

Q. *You have told in substance what this exoneration form contained. I ask you to look at this defendant's Ex-*

hibit A for identification, and ask you if that is the type of form that was used? A. That is the type, yes, sir. I don't know the exact wording.

Q. I think you said that the form was printed? A. Yes, sir, it is a printed form.

Q. What portion of the form would you fill in?

Mr. Offutt: I object, unless that is an exact replica of the form.

The Court: Mr. Quinn, this witness yesterday was unable to state anything that was on that paper. The only thing he could state was a conclusion; and, that being so, the Court cannot admit that as a copy, on the theory that the original had been lost.

Mr. Quinn: He stated that it exonerated him from blame.

The Court: I know he did, but that is a conclusion.

Mr. Quinn: I propose to show that those are just the words that are in the form.

The Court: He was unable to tell you what words that are in the form, and therefore he cannot tell you today by hearing what you say is alleged to be a copy. The Court rules that it is not admissible in evidence.

Mr. Quinn: I have not offered it yet.

The Court: I thought that was the purpose of it.

Mr. Quinn: I just wanted to lay the foundation, and follow it up by showing the disappearance of the original. But I should show how much he knows about it.

The Court: He testified to all that in chief, over and over again. Over and over again you asked him what was in the copy and he could not tell you.

Whereupon the witness testified that he had filled in his name as the driver of the truck with pencil and that Mr. Traynor also signed his name with pencil.

It is apparent that on three occasions the witness stated that he could not tell as to the wording of the paper—that

he could only state what it meant. With this lack of knowledge as to the contents of the paper, the Court properly ruled that the witness by his testimony as to his lack of knowledge of the contents of the paper could not identify the proposed copy or any copy as a correct copy of the original. The tender of evidence on which the Court made its ruling is found on Pages 204 and 205 of the Record. Under the offer of the tender, the tender was legally incompetent and inadmissible because no witness other than the driver could say of his own personal knowledge whether the copy was a genuine and authentic copy of the purported original. The tender of evidence failed because a proper foundation had not been established, and the Court correctly ruled that the copy was inadmissible because it was not established as an authentic and genuine copy of the exoneration form.

The necessity of having the support of a witness qualified to say that the copy is a true reproduction of the original is fundamental. The principle is stated in 4 *Wigmore, Evidence* (3d ed. 1940), par. 1277:

A copy, merely as a piece of paper, has no standing as evidence. In order to even to be termed "copy" it must have the support of a witness qualified to say that it represents the contents of the original document.

In *Vol. 2, Jones on Evidence, (Fourth ed.)*, par. 523, the rule is stated as follows:

To sustain admission of evidence of a copy of a document, it is essential that the copy be properly identified and connected with the original and its accuracy and verity be established. * * * Of course the witness must have knowledge that the copy is correct, or if he gives parol evidence he must show competent knowledge.

In *The matter of J. B. Gazett*, 35 Minn. R. 532, 29 N. W. 347, the Court refused to admit a copy of an original because of the same failure of proof as to correctness of the copy stating:

It was not enough that, according to the recollection of the witness as to the original answer, (which may have been very indistinct) this paper had the appearance of being a copy, or seemed to have been such. To render this secondary evidence admissible, it was requisite that it be shown to have been a copy of the original.

Secondary evidence was not allowed in the case of *Nosttrum v. Halliday*, 39 Neb. R. 828, 58 N. W. 429, for the same reason:

Pg. 832. But there was not sufficient proof to justify the reception of the plat offered as secondary evidence. Moeller says that it is an exact copy, to the best of his knowledge. He cannot tell who made it. He did not compare it with the original; it looks like the original. He thinks his wife copied it because it looks like her writing. This is substantially all on the subject. It will be observed that it was not shown that the plat was a copy, the person who made it was not produced, and the witness by whom it was proved did not know with certainty who made it or under what circumstances and he did not pretend to say it was a copy, but merely that it looked like the original plat.

To a like effect is *City of Birmingham v. Louisville & N. R. Co. et al.*, 297 F. 816:

However, in this case it is not necessary to go so far as to hold that before the witness would be qualified to testify to the contents of the map, they should be able substantially to reproduce or describe the whole map. We prefer to rest our decision upon the broader ground that the testimony offered is too unreliable and unsatisfactory. Even if that testimony had been admitted, it would still have been the duty of the trial

court to direct a verdict for the defendant. It is not shown that the witnesses ever carefully examined the map or were familiar with its contents. Under these circumstances, their recollection as to what was disclosed by it with reference to Nineteenth street, more than forty years before they testified is of no evidential value whatsoever.

McGinniss v. Sawyer, 63 Pa. St. R. 259:

Pg. 266. The testimony of Mayor Patterson was "I would take this to be a copy of the original or what I thought to be the original in the handwriting of Steele" and of Neastings: "I saw the original plan; I would take this to be a copy of the original plan". To admit in evidence a copy upon testimony of this vague and loose character would be fraught with great danger to the rights of the parties.

The foundation for the introduction of the copy was a preliminary question for the determination of the trial court. The extent of the foundation required was within the discretion of the trial judge. The rule is stated in *Vol. 2 in Jones on Evidence (Fourth ed.)*, par. 500:

Doubtless a proper foundation must be laid for the admission of documentary evidence; that is, the identity and authenticity of the document must be reasonably established as a prerequisite to its admission in evidence.

The extent of the foundation for documentary proof lies in the discretion of the trial judge.

Also, see *Topinka v. Minnesota Mut. Life Ins. Co.*, 184 Minn. 75, 248 N. W. 660.

In reviewing the ruling of the Court acting in its discretion and in determining the correctness of its ruling, certain considerations must be remembered. The form of exoneration relied upon was one of a form carried about by the appellant's drivers and within their power to handle as

they pleased. A dangerous situation could easily arise by the failure to produce the original form, for then it would enable a party to prove exoneration of liability by a copy which the other party could not disprove except by denial but which he might disprove if the original was available. The copy would become more valuable than the original. Further, if appellant was allowed to prove the tender offered, he would have been enabled to show to the jury that its insurance carrier had gone into bankruptcy and thereby attract the sympathy of the jury, a matter which he would have been unable to show independently (R. 214).

Also, the testimony of the witness Westcott, to whom the paper was supposedly turned over by the truck driver, did not show that the paper had been turned over to him. This witness testified that he could not state whose signature was on the paper (R. 206) and that the paper given to him was one with questions on it, and the questions were printed. That he could not recall approximately how it was worded (R. 207). It is submitted that the evidence given by the witness shows a paper different in form than that relied upon and the effort to show that the document was lost failed because it was not established what happened to the paper after it left the person of the driver.

It is respectfully urged that under the circumstances of this case, it was properly the duty of the trial court to require strict proof as to the genuineness of the copy and not to allow it to be offered into evidence for the jury to speculate as to whether or not the copy was authentic and if its contents true and complete. The prejudice that might arise to a party by the introduction of a copy that he is unable to disprove is so great that any rule of admission other than the strictest requirement for exact proof for secondary evidence would be unfair and unwise.

(b) No harm was occasioned to the appellant by the failure to allow the copy to be introduced as the appellant did in fact introduce into evidence the secondary recollection testimony of the driver of the truck of the substance of the exoneration paper, and which the jury must have considered in reaching its verdict.

The best evidence rule permits secondary evidence to prove the contents of a lost document either by recollection testimony of a witness familiar with the contents or by a copy of the document. The recollection testimony of the driver as to the substance of the paper did in fact inform the jury what the copy of the paper would have shown. Without considering the question as to whether recollection testimony or copy evidence is more desirable from a legal point of view, either type is sufficient for proof. The quoted testimony as italicized shows that the witness, Emmert, did in fact testify as to the substance of paper and the testimony was not objected to and it was not stricken from the record and it forms a part thereof. The failure to permit the copy, even if erroneous, was harmless to the appellant as he could not have proved more by the copy than he did by the recollection testimony of the witness, and the copy would have been only cumulative.

Further, the jury was instructed that in considering the testimony of the witnesses they could consider any contradictory statements made or any positions taken by them elsewhere than at the trial (R. 234).

What value the jury placed upon the evidence as to the exoneration form is, of course, unknown. But in the light of human experience and normal emotions, it is urged that reasonable men would not be impressed by the procuring of an exoneration form from one who is lying on a stretcher in a police car and who was so badly hurt that for three days thereafter he was forced to stay in a chair and he could not

be moved because of his condition, and for three years thereafter he suffered from the effects of the accident to such an extent that he became a different person and his health became ruined.

Small wonder it is that the State of Minnesota by Statute in *Stats. 1927, Supp. 1934, par. 5687-8*, declares that a statement secured within 30 days after injury "shall be presumably fraudulent for use in the trial of any action for damages" etc. Or that the state of Wisconsin, *St. 1911, c. 123, P. 125, Stats. 1937, Par. 325-28* provides that "in civil actions for damages caused by personal injury, no statement made or writing signed by the injured party within 72 hours of the time the injury happened or accident occurred shall be used in evidence against the party making or signing the same unless such evidence would be admissible as part of the "res gestae". See *Wigmore, Volume 4, (3d edition, 1940) note, par. 1050*.

(c) The affidavits filed in support of the motion for a new trial (R. 12, 15) show that the original paper was found on the day following the trial when the appellant extended its search for the form from an effort to locate the paper to a diligent search for the document. It is respectfully urged to the Court that by its own showing the appellant had not used reasonable and ordinary diligence to find the original and therefore cannot now complain of any of the rulings of the Court as to the copy of the original. Considering that the Declaration was filed on August 2, 1937, the affidavit in support of the motion (R. 15) relates that the first effort to obtain the original was made on October 2nd (presumably of 1939), which taken with the finding of the original on the day following the trial raises a serious doubt as to whether the document could in fact be said to be lost.

Appellee respectfully requests the Court to consider the legal admissibility of the exoneration form, if the question becomes of importance. The exoneration form is not an admission by appellee of any fault on his part but exonerates, whatever significance that word may have, the driver from "blame or negligence" for the accident. Counsel for appellee are unable to find any decision in which the Court considers the admissibility of a statement as here is concerned. It is axiomatic, that a statement or admission relating to a question of law is not admissible in evidence. See, *Texas Employer's Insurance Ass. v. Sewell*, (*Tex. Civ. App.*) 32 S. W. (2d) 262; *Potts v. Park Inv. Co.*, 27 *Ohio App.* 235, 161 N. E. 40; *Wright v. Quattrochi*, 330 *Mo.* 173, 49 S. W. (2d) 3. Assuming that the original exoneration form might be used for impeachment purposes to call upon the appellee to explain his reason for signing the paper, it is submitted that it could not be used as evidence because it has no probative value.

The exoneration form partakes of the nature of a cancellation of possible liability in that it does not state that the driver is blameless or not negligent, but only that he is "exonerated" of such conduct. A construction to the effect that it relieved the driver of liability for any blame would constitute the paper as a release, but invalid for want of consideration. If it is to be considered as admissible for showing an inconsistent prior position, it has no bearing on the issues because it does not state that the driver is without fault or is not negligent but only that he is "exonerated" of blame or negligence. It is respectfully submitted that the paper is of no probative value; that it is uncertain in significance; and that it was of no value in determining the issue of the case under the circumstances.

II.

The Court did not err in denying appellant's motion to withdraw a juror and declare a mistrial and no improper or prejudicial remarks were made as to the evidence and to or towards counsel and witness.

The appellee without qualification submits that the appellant was accorded a fair and impartial trial and that the trial court at no time did any act and made no remark to the prejudice of the appellant. It is difficult to understand how any question of prejudicial comment by the court can be made when the conduct and remarks of the trial court are considered.

The question becomes more difficult of understanding when viewed in the light of the rule in Federal courts as to the right of the trial court to comment upon the evidence or express an opinion. The rule is fully stated in the case of *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 553, 30 L. ed. 257, 258, 7 Sup. Ct. Rep. 3:

"In the Courts of the United States as in those of England, from which our practice was derived, the Judge in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error"

M'Lanahan v. Universal Ins. Co., 1 Pet. 170, 7 L. ed. 98:

"The test is: did the court leave the jury free to exercise its own judgment as to the facts."

There can be no doubt that measured by this test, the trial court did leave to the jury, in a proper manner, for

it to decide the ultimate matters of fact in the case. No substantial right of the appellant was denied, and the Appellate Court will not review errors not affecting the substantive rights of parties. *Rule 61, Federal Rules of Civil Procedure*, and *Gutshall v. Wood*, No. 7662, decided November 3, 1941.

As to whether the court infringed upon the jury's determination of the ultimate matters of fact, the attention of the Court is referred to the charge of the trial court and particularly, the following part of the charge:

The jury, under our system, are the sole judges of the facts in the case. I have not anything in the world to do with them, that is your function and, of course, your responsibility (R. 235).

Now those are the two contentions, and, as the court indicated, I have no intention of commenting in any way upon the weight of the testimony or of the specific statements made by witnesses, and the reason for that is this, that the court believes that it is inevitable that if a judge undertakes to detail the testimony, it is impossible for him to do it exactly as the record shows it, and that he will either give undue emphasis to one side or the other, and that for that reason the court should refrain from making any comment upon the specific factors that go to make up the testimony either of the plaintiff or of the defendant (R. 236).

The trial court had instructed the jury that the burden of proof was upon the appellee. Thereafter in its charge the trial court stated that the jury in considering the facts should not be guided solely by the number of witnesses (R. 236, 237). Keeping in mind that as to the accident itself the appellee and one other witness testified on behalf of appellee, and the appellant had only one witness, it is apparent that the trial court voluntarily undertook in his charge to protect the rights of the appellant.

The trial of the action lasted for three full days and on the afternoon of the third day, and after the case was fully argued by counsel for the respective parties, an adjournment was taken and the jury was to be charged by the court the following day. On the morning of the next day, counsel for appellant for the first time objected to any remarks or comments previously made by the court. As such, the objection came too late and the motion to withdraw a juror should have been denied on that ground alone, *Rule 46, Federal Rules of Civil Procedure*.

Proceeding to the merits of appellant's point of prejudice, it is respectfully urged that the record shows that the court did not make any remark or any comment which was prejudicial to appellant. In any case lasting for three full days and extending to a fourth day, counsel for either side could ordinarily find by a search of the record six incidents which when grouped together could be made the basis of an argument that the trial court was partial to one side or the other. But viewing the proceedings in their entirety, there can be no doubt as to the court's impartiality, and, further that his remarks and comments were entirely within the privilege and rights given to him by the Federal rule of law heretofore cited.

It is not difficult to find through a casual reading of the record where the court ruled as favorably with appellant. The trial court of its own motion made comment that it would not allow appellee to introduce certain evidence unfavorable to appellant (R. 30, 48, 69). Also that the court saw no objection to a statement made by appellant's counsel which appellee had characterized as unfair (R. 35); that appellant's counsel had correctly stated the evidence on a certain point of evidence (R. 48). The court of its own motion ruled favorably for appellant on a line of cross-examination (R. 59), and on a question as to the testimony given by a witness, the court suggested favorably for ap-

pellant that appellee's counsel permit appellant to complete the cross-examination (R. 90). On a question between counsel as to what a witness had said, the court held that the testimony coincided with the purpose of appellant's cross-examination. Consideration was allowed to appellant to produce witnesses (R. 136) and the court advised a witness for appellant to take his time in answering (R. 184). The court restrained further cross-examination of appellant's driver of his own motion (R. 194) and later permitted appellant's counsel to ask preliminary leading questions against objection (R. 208). These incidents as well as many others in the record show that the court was not prejudiced against appellant.

With respect to the particular items complained of, the appellee without further comment submits to this Court whether the statement, made by appellee: "Well, it was fair. It had been a little damp in the morning when we started out, but it seemed to be very fair at the time of the accident. It did not seem to be wet or raining at that time," means that the road was dry, or as the witness stated, only fair.

The appellee also submits without argument that there is no impropriety or prejudicial conduct to tell a witness to take his time in answering. The court said the same thing to appellant's principal witness (R. 184).

The colloquy as to the court's knowledge of shell shock came about by appellant's counsel stating that it may or may not be shell shock (R. 145), and the court responded, and then counsel for appellant stated that he did not know about that. It was only natural and also proper for the court to state the foundation of his knowledge. Also the appellee's experienced physician had stated that appellant's condition was a nervous affliction due to shock (R. 141).

As to the witness' estimation of distance, his testimony that the trailer truck was either 20 some feet or some 20 feet as stated was in evidence (R. 181). He certainly meant 20 feet as the court stated (R. 189) and the court added:

"The criticism of the court is not that he was trying to do the best he could. It was only that it appeared that his idea of distance was not accurate" and "I don't think it was prejudicial at all. I understood yesterday, as near as I could tell, that he meant 20 feet. He might have said 20 some—I don't know".

The fact is that the trailer-truck was 39 feet and the witness' idea of distance was inaccurate and the court stated that his statement as to 20 feet (which the witness meant) was what the witness meant as nearly as the court could tell, and that he might have said 20 some. This left the matter for the jury to determine what had been said.

It is submitted that the foregoing was not prejudicial and the matters were properly commented upon, and that the other matters complained of likewise were not prejudicial. There is a vast difference between the comments made in the cases relied upon by appellant, nearly all of which are criminal cases, and the remarks in this case. By way of comparison consider the comments in *Ruppert v. Wolf*, 4 D. C. Appeals, 556, relied upon by appellant:

The Court: On your own statement, you ought to be where that man was, who was sentenced a year ago in the Albany Penitentiary.

The Witness: I did not know anything about that. I did not do anything wrong.

The Court: If I were holding the Criminal Court I would hold you for the grand jury.

Mr. Worthington: Will your Honor allow us to take an exception to that?

The Court: Yes, sir; take all the exceptions you desire. He is an unmitigated scoundrel on his own statement.

III.

The motion for a new trial was addressed to the discretion of the trial court and it did not err in denying the motion and its ruling was made in the proper exercise of its discretion.

The appellant's argument as to error of the court in overruling appellant's motion for a new trial is apparently predicated upon the ground that having found the original exoneration form, he therefore became entitled to have a new trial and the refusal by the trial court to grant the new trial is grounds for reversal by this Court.

This Court has frequently stated that the granting or denying of a motion for a new trial is discretionary with the trial court and only in cases of abuse may the Appellate Court disturb its ruling.

Washington Times Co. v. Bonner, 66 App. D. C. 280, 86 F. (2d) 836; *Atlantic Greyhound Lines v. Kessee*, 72 App. D. C. 45, 111 F. (2d) 657; *Ecker v. Potts*, 72 App. D. C. 174, 112 F. (2d) 581.

The rule as to review of the action of the trial court in its ruling on a motion for a new trial as to newly discovered evidence is stated in the case of *Mandes v. Midgett*, 49 App. D. C. 139, 261 F. 1019:

“Error is assigned in the refusal of the Court to grant a new trial because of certain alleged newly discovered evidence. An examination of the affidavit in support of this motion discloses that what is referred to as newly discovered evidence is largely cumulative of evidence adduced at the trial and passed upon by

the jury. But aside from this, the settled rule of the Federal courts is that refusal of a trial court to grant a new trial because of newly discovered evidence will not be disturbed, except in a case where there is a manifest abuse of discretion, and no such case is presented in this instance."

See also, *Fitzgerald v. Dodson*, 58 App. D. C. 150, 26 F. (2d) 522; *District National Bank v. Maiatico*, 61 App. D. C. 242, 60 F. (2d) 1078.

The rule as to the essentials necessary to be established to obtain a new trial on the basis of newly discovered evidence is stated in the frequently cited case of *Vickers v. Philip Carey Co.*, 49 Okl. 231, 151 P. 1023, LRA 1916 C. 1155:

"While 'newly discovered evidence' material to the party applying, which it could not with reasonable diligence have discovered and produced at the trial, is ground for a new trial, applications on this account are not favored in law (citing cases). Such applications are regarded with suspicion and should be examined with caution. 14 Enc. Pl. & Pr. 790. In an early decision (*Berry v. State*, 10 Ga. 511) the rule was established that a new trial would not be granted on a mere showing that new evidence had been discovered.

Such evidence, it was said, in order to be sufficient, must meet the following requirements: (1) It must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be merely cumulative to the former evidence; (6) it must not be to merely impeach or contradict the former evidence. This rule is one that is now in force in a large majority of states, and has in some jurisdictions been incorporated into the statutes or codes or procedure.

Further, in the course of the opinion, "A party is entitled to have his day in Court; both parties are entitled to this, but neither party is entitled to have more

than one fair, reasonable opportunity to establish his claim or defense. To allow more would be to protract litigation to the extent which would preclude the administration of justice.' "

Whether or not a party has shown reasonable diligence, or whether the new evidence will work a different verdict on a new trial, or other such considerations, are matters to be decided by the trial court, and the court's decision will not be reviewed unless there is a manifest abuse of discretion in the finding of the trial court. For the statement of the law applicable, see, *Devine v. Wills*, 300 Mo. 177, 254 S. W. 65; *Temple Cotton Oil Co. v. Holliday*, 186 Ark. 514, 54 S. W. (2d) 304; *Arkansas Power & Light Co. v. Mart*, 65 S. W. (2d) 39.

5 *Corpus Juris Secundum*, Par. 1625, P. 533, further states the rule,

"The denial of such a motion has been upheld—Where it was not shown that the evidence would come within the rule authorizing the Court to grant a new trial on account thereof; where the evidence was merely cumulative; where every material fact alleged in the motion is contradicted by counter affidavits; where the evidence if admitted would be used only for purposes of impeachment; or where it is of a character which could not reasonably produce a different result."

With the foregoing statements of the law in mind, it is submitted that the trial court acted within its discretion in denying appellant's motion for a new trial.

(a) Would the original paper change the result if a new trial had been granted? It is to be remembered that the appellee testified that he did not remember having entered a plea of guilty before the Justice of the Peace and he stated that afterwards his son told him about what had taken place. The son related the circumstances under which

the plea was entered. The appellee did not remember having signed any exoneration form or any other paper for the appellant's driver and the son stated that during the time that he was with his father no paper was signed for the driver.

The latter testified that the paper had been signed, and the italicized portions of the testimony heretofore quoted show that the driver had stated what the purport and substance of the form was. The court in its charge read an instruction to the jury which informed the jury that it should consider any contradictory statements made or any positions taken by them elsewhere.

It is now urged by appellee that the jury considered the exoneration statement as it did the proceedings before the Justice of the Peace, and as reasonable men, considered what had taken place and the nature of appellee's condition and they were not influenced one iota by either circumstance. The trial court unquestionably considered these factors in his ruling on the motion for a new trial, and the court considered that the exoneration form would not have made any difference to the jury if seen in addition to having been heard. Certainly there can be no abuse of discretion in the opinion of the trial court that the document would have made no difference in the result.

(b) The evidence was not discovered after the trial and was not newly discovered evidence. It was evidence known during the trial but which could not be located by casual search. Where evidence is "lost" it is incumbent on the party relying on the evidence to seek a continuance until he can inform the court with certainty that the lost evidence cannot be found.

(c) Could the exoneration form have been discovered before the trial by the exercise of ordinary and reasonable diligence? A reading of the affidavits in this case raises

the immediate question, if the form could be found the day following the trial, why could it have not been found during the trial? And if the matter was of importance, why did not the appellant undertake a renewed search during the trial, and if necessary request a delay for that purpose, rather than wait until the jury had brought in an adverse verdict? The inferences that naturally arise are that appellant did not believe the exoneration form of sufficient importance to request it during the years that the action was awaiting trial, and after learning that it could not be found it did not deem it to be of sufficient importance to request a continuance in order to have a renewed search made.

When the appellant understood that his secondary documentary evidence would be rejected, could he have not made the same telephone call on that day to have a renewed search made rather than wait until it was known what the jury would do with the case, and then on the day following the verdict to take up the search and on the same day to find the paper. As stated in *Vickers v. Philip Carey Co.*, supra, the effect of the procedure taken by appellant was to have one trial and upon an adverse verdict being rendered to take advantage of its lack of diligence to have a second day in Court.

Under the circumstances, it was clearly a question for the trial court to determine if due diligence had been used to find the paper, and it was not an abuse of discretion but a proper exercise of its discretion to hold that the appellant had not used due diligence.

(c) The original paper was merely cumulative as has been heretofore maintained in the argument as to the correctness of the ruling of trial court on the rejection of the documentary secondary evidence, and the court properly exercised its discretion to so rule.

(d) The original form was not evidence of any material fact to the issue and could be used only for purposes of impeachment. The document was therefore not of the type of evidence for which a new trial will be granted.

In the case of *Harris v. Wall*, 144 Va. 774, relied upon by appellant, the Court based its decision upon the ground that the case was not an instance in which the defendant should have anticipated the necessity for having the cancelled checks in court and granted the new trial to prevent a manifest injustice that attended the essence of the cause of action.

It becomes apparent (1) that the appellant's motion was not within the requirements needed to allow a new trial for newly discovered evidence; (2) that the refusal to grant the motion for a new trial was properly overruled; (3) that no abuse of discretion appears in the ruling of the trial court and this Court will not review the ruling of the trial court in the absence of any abuse of discretion.

IV.

The issue in the case was clear and well defined. The evidence on behalf of appellee was competent and sufficient to support the verdict, and the issue having been decided by the jury after a fair and proper charge as to the law, the verdict of the jury is conclusive.

The evidence indicates that the issue presented to the jury was clear and well defined. It was simply whether the jury believed the appellee's evidence as to the manner in which the accident took place, or whether the jury believed the evidence given on behalf of the appellant. The issue was squarely one of a conflict of testimony and it was so understood and acknowledged by counsel for the parties (R. 218, 219).

Because the appellant places great importance upon the significance of the plea entered by the appellee before the Justice of the Peace, and the purported exoneration form, and because of the length of the record and the recognized tendency for a summary of the evidence relative to the issues, it is believed necessary to summarize in appellee's brief the evidence having bearing on the manner in which the collision took place, and the circumstances under which the plea was entered, considering also the physical condition of the appellee immediately following the accident, and continuing to the time of the trial. The evidence will show without question that the finding of the jury was proper and that its verdict should not be disturbed.

William F. Traynor, Sr., the appellee, testified in his behalf as follows (R. 27): That on October 17, 1936, he was operating an automobile owned by his son, and that he was on his way from Philadelphia to see his sisters in Washington. That he left about 4:30 in the morning, and that he maintained a speed of between 30 and 35 miles per hour. Just before coming into the intersection he saw a speed sign of 25 miles an hour and that he was under 20 miles an hour when the accident happened. That since the accident he had stepped off the distance from the sign to the point of collision and that it was 44 yards. At the time of the accident there was a high hedge fence on the right-hand side of Conowingo Road that made it pretty hard to look over, and that later the hedge had been removed. That he had driven on that road many times before and that he knew that the curve was there. That the condition of the roadway at the time was fair. It had been a little damp in the morning when he had started out, but it seemed to be very fair at the time of the accident. It did not seem to be wet or raining at that time. That he watched his speedometer and cut down his speed and made the approach into the intersection and came to the curve. That his car

was under control and he was on the right side of the road. As he came to the curve, he saw the truck cutting to him, crowding him, and he remembered giving his wheel a pull and making an effort to get away from the truck, and he remembered nothing more until he was taken from the machine. To his best judgment, the truck was not more than 10 feet away from him when he first saw the truck and right on top of him, heading for him, and that he already made his approach over the line when he first saw the truck come toward him. There was a center line in the road and he was on the right side of the line. That there was a curbing on both sides of the road about 10 or 12 inches off the roadway. That he was about $2\frac{1}{2}$ feet from the curbing, and that the road at that point was nine yards wide. That he was right in the turn at the time the accident happened, and the next thing he remembers is that after the accident he was being carried to a doctor on a stretcher. That he felt "terrible" and he was nearly "crazy with pain". He was all "befogged". His head and his back hurt him so badly that he could not move and he could not lift his arm and he was "nearly crazy with pain". That he had since tried to locate the doctor but was unable to find him. That he remembers seeing his son at the doctors and he was carried out on the stretcher and put back into the ambulance and that they stopped in front of a building somewhere and he could hear somebody talking. He did not know what was being said and that he remembered shortly afterwards being in the car. He did not know how he got into the car but he remembers being in the car. That he was driven by his son from Bel Air to this side of Baltimore at Dead Man's Curve when the car stopped and would not go further. His son called to Washington for his sisters and when they got there about 5:00 o'clock that evening he did not even know them. That he was suffering with agony and pain and he thought he was going to die, and he was taken

to Freedmen's Hospital in Washington where he was given first aid treatment but that he could not stay because no bed was available and he was supposed to come back on Monday morning or Saturday morning. He went to his sisters' home and when he got there, they carried him from the machine in a chair to the living room and propped him in that chair with pillows and cushions because he was too sore to be touched or laid down. While lying down he could not get his breath, and he stayed in that chair all that night until about 1:00 or 1:30 Sunday. His family then came to Washington to bring him home and when he got home he rested for two days and two nights in a reclining chair, propped up and his condition was so bad that he screamed if he was touched, and after the two days, his son-in-law and a storekeeper and his brother carried him up to bed. That he stayed in bed for two months before he could get out being under a doctor's care all the time. During that time he was unable to move and he had to be helped to turn from side to side because his back was so bad he could not lay on it. Prior to the accident he had been employed as a structural ironworker, doing heavy work, with no sickness at all, or no injuries, and did not know what it was to be sick. That it was four or five months before he could get out and walk, and he was under the doctor's treatment for five or six months after the accident. On cross-examination, the appellee testified that he did not skid at all when he went to turn and that he did not remember anything about the position of the machines after the collision. That he did not remember being before the Justice of the Peace and being charged with reckless driving, but after he got home, his son told him that he had been fined a dollar and costs. He did not recall signing a paper for the young man who was driving the truck exonerating him. The first thing he could really remember after coming from the doctor's was his son putting a blanket around him in his son's car to

keep him warm. That is when he first regained consciousness enough to know that he was on his way to Washington, and he did not remember seeing a policeman. That since he worked in 1937 for three months.

George Ignatius Moleski, of the U. S. Navy, the son of Dr. Ignatius Moleski, testified (R. 65) that his father had died August 31, 1939, and that he brought his father's records pertaining to the appellee's case. By stipulation of counsel (R. 140) the records of Dr. Moleski, pertaining to the appellee's treatment, were admitted into evidence.

William F. Traynor, Jr. (R. 72), testified that just before the accident they had been driving along about 30 miles an hour, and he called his father's attention to a speed sign and his father slowed down to about 18 or 20 miles an hour. That the speed of the car as near as he could judge was around 18 to 20 miles an hour. That they slowed down and started to come around the curve when they noticed the truck of the appellant coming toward them, and as he looked at the truck his father pulled the wheel as far as he could to the right hand side of the road. Then there was a crash. When he first saw the truck it appeared to him to be about 15 feet away from them. It had been raining a couple of hours before, and the road was still damp, but it was in fairly good driving condition. There was a white line in the center of the road and they were riding about 2 or 3 feet from the curb line of the road and they were right about the center of the curve when he first noticed the truck. He could not fix the speed of the truck in the time that he saw it. When the collision occurred the truck was on their side of the white line. There was about 2 or 3 feet between the white line in the center of the road and the driver's side of their car. The left front of the truck struck the left rear side of their car. The collision knocked out both him and his father and the next thing he remembered was seeing the truck that hit them backing up, away from the accident, over to the

curb, and that it backed to the right hand side of the curb on *its* side. His father was unconscious, and later a state trooper came along and took him to a doctor, leaving him there at the scene. Following the accident, he noticed that the left front headlight and the grille on the radiator had been smashed in and the left front fender, but there was no damage on the right hand side of the front end of the car. The state trooper returned for him about 20 or 25 minutes later and took him to the doctor. When he came into the doctor's the appellee asked him to set him up, so that he could get his breath and he was complaining of pains and aches. He said every time he tried to move, it would hurt him. He was holding his sides and his leg was hurting and his head and all hurt him and he could hardly turn over either way and his legs were both twisted out and he could not stand up or sit up at the time. From the doctor's office the state trooper drove them through the town and stopped in front of a building and brought out a man who was either a magistrate or a Justice of the Peace. The state trooper told them they would have to see this man before they could be released. The man came out and he said to his father that he would like to help him as much as he could and said there was no way of having a hearing, for him to bring him in the courthouse in the condition in which he was, but he told him that due to his accident, if he would plead guilty to a reckless driving charge, he could impose a fine upon him and leave him go and the witness asked him how much the fine would be, and he was told \$1.75 and he told his father to go ahead and pay it so that they could go back to Washington, because they did not know anybody in that town (R. 80, 96). No testimony was taken of any kind and that to his knowledge his father did not sign any paper. His father was suffering during all the time, and when they got back to their car, the state trooper, the driver and witness helped to get his father back into the car. He started

to drive back to Washington and the car broke down on the road on the other side of Baltimore. That they waited for witness' aunts to come for them, and his father was in a delirious mood all during that time, and several times had coughing spells and spit blood, and he fainted, and when appellee's sisters arrived, appellee did not recognize them and told them to leave him alone, and they could hardly move him because he complained so much that it hurt him. That the appellee was taken to a hospital and from there to the home of witness' aunts and there a couple of the neighbors and witness put appellee in a chair and picked the chair up and brought him into the house and he was in pain all the time. That he did not sleep that night. That appellee was taken back to Philadelphia and they could not take him upstairs because they could not get him up the steps so they put him in a chair in the living room and he stayed in the chair for a couple of days before he could be moved. That before the accident, appellee was a healthy man and after the accident he was ill and complaining of pains. On cross-examination, the witness testified that after the accident, the left rear wheel of their car was over the center line and the front end was not quite against the curb, the car not being that long (R. 88). That from his examination of a picture shown to him, the suggested imprint of headlights of the truck on the machine (R. 90) was not a circle but a piece of rope hanging on the side of the car at the time (R. 90). That while he was with his father he did not see his father sign anything for the operator of the appellant's truck, and he did not hear the Justice of the Peace say anything to the driver of the truck (R. 96). That the state trooper and the truck driver and the Justice of the Peace were standing outside of the car and appellee and witness were seated in the car. That the Justice of the Peace did not say anything about having a trial or coming into his court room. That he could not

remember that he had told the Justice of the Peace how the accident happened, and that it was not a fact that his father told the Justice of the Peace that the road was wet and he skidded over on the left side of the road (R. 97). In demonstrating the position of the cars (R. 100) at the time of the collision, witness fixed the truck with the center of the radiator just over the white line.

Mrs. Marge A. Munson. (R. 107) The witness testified that she was a sister of the appellee and was employed at Freedmen's Hospital and was so employed at the time of the accident. That she and her sister called for the appellee on the afternoon of the accident and that he was lying in the car moaning and he did not recognize the witness and her sister and he was in a terrible condition, and he didn't seem to know anything. That he had to be pulled and dragged into their car and brought him to Washington, to the hospital. That he had to be taken into the hospital on a stretcher, and had to be taken from the hospital because there was no bed available, and he was carried into the house on a chair and he remained in pain. Prior to the accident, he was a very healthy strong man working as an iron worker. After the accident, he was a different man. He did not look the same; he tired out and if he did any walking or exertion he had to lie down and rest. Five witnesses then corroborated the foregoing testimony as to the appellee's physical and mental condition immediately following and subsequent to the accident. They were, Dominic Biondi (R. 115), Mrs. William F. Traynor, Sr. (R. 119), Mrs. Eleanor Allen (R. 127), Thomas J. Traynor (R. 131), and Mrs. Minerva T. Biondi (R. 134).

Dr. William A. Warfield (R. 143), a practicing physician in the District of Columbia since 1894, and surgeon in chief at Freedmen's Hospital for thirty-five years, testified that he examined the appellee in April of 1938 and that in his opinion, the appellee was suffering from neurasthenia

following the trauma. That he had a nervous affliction due to shock and that as a result of the injury he had lost considerable nervous energy which helped to produce the condition, and which was directly traceable to the accident, and which condition could reasonably be expected to continue indefinitely.

Lester H. Santee (R. 148), a member of the Maryland State Police, testified that he had no independent recollection of investigating the accident involved in the action, but that he had made a report of the accident, and that the report did not refresh his recollection in any way. The report indicated that appellee had been taken to a doctor and found not to be seriously injured and appellee complained of an injured right leg found to be temporarily paralyzed by force of the impact, also of sore chest and "catch" between shoulder blades. That appellee plead guilty to reckless driving, was found guilty, and fined \$1.00 and costs of \$.75. The witness testified that it was impossible to see around the intersection because of certain shrubbery, and the view was obstructed from the Broadway road to the same extent as on the Conowingo road. The witness verified certain conditions of the roadway as testified to by appellee's witness.

Stanley S. Spencer (R. 160), a magistrate in Bel Air since 1929, testified that he had no personal recollection of the case. His docket entry showed a hearing for appellee, a plea of guilty, and fine of one dollar and costs. An effort to refresh his recollection failed to do so. The magistrate testified (R. 164) that he did not recall Mr. Traynor being before him in an automobile outside of the building, or that he had stated that if he (Traynor) wanted to plead guilty and pay a fine he could leave, but witness also stated that "It may be true."

George Emmert (R. 168), the operator of appellant's trailer, testified that the accident occurred about 8:00 o'clock

in the morning, and that he was going north on Broadway. That as he was approaching the intersection of Conowingo Road, he was going very slowly and when he had gotten within 25 or 30 feet of the corner he noticed appellee's car coming out of Conowingo Road. The car was going quite rapidly, he thought, to make a turn and the driver in his mind was apparently confused. Appellee turned the wheel very suddenly to the right as he came into view at the corner. The street was slippery. It had been raining most of the night, and as he turned the wheel, he slid sideways after the wheels, the front wheels, seemed to almost set still, and the car pivoted on that and swung around and came into the front of his truck. When he saw him first start to skid he applied the brakes and got right upon, against the curb. That he was only a foot or two feet away from the curb. The machine he was driving was a skeleton trailer. It had a framework of steel that the cars rode on. One car went over the top, one down the back and one car rides on a short trailer. That he was about 15 to 20 feet back from the intersection when the car came into him. That he was at a standstill when appellee crashed. That after the accident he believed they pushed the tractor around. That appellee swung around and went into the front of the truck and bounced back, a foot or two feet away from it, and went into the truck as indicated by him. That after being at the doctor's office with appellee and his son, they went to Judge Spencer, and that the latter asked them how the accident had happened. That the only outstanding thing he could remember about any conversation between appellee and Judge Spencer was appellee told Judge Spencer that if the street had not been wet, he could have made that turn. Witness believed appellee asked somebody to get some money out of his back pocket, his billfold. That thereafter he had the appellee sign a paper for him which read at the top "Exoneration Blank." That the form said

as to him (R. 175) that it exonerated him from any blame in connection with the accident. That appellee was still in the police car when he signed it, and that his son was there at the time. That he turned in the paper with his accident report in Chester to a Mr. Westcott, who at that time was the assistant service manager. That the radiator was damaged all across the front and the headlights were broken. That the condition of appellee at the time of appearing before the magistrate was that he appeared uncomfortable but otherwise he did not seem to be so badly hurt. He indicated he was uncomfortable by just moving around. He said his arm hurt, or side hurt, or something. That he seemed to understand everything that was going on, and he spoke plainly. That the total length from the front lamps to the tail end was 20 some feet, he didn't know exactly. That witness thought appellee was going through the intersection straight for a moment, straight across, and then as he neared the center, very nearly the center of the intersection, he turned the wheel sharply to the right. That he estimated that appellee went out 15 feet into the intersection before he started to make the turn. That the car was going at a pretty good speed and there was no time to judge it, but at one time he estimated the speed at 30 miles an hour. That when the wheels of appellee's car were turned the wheels did not take hold immediately on the ground; probably a few feet, and then they began to pivot on the front wheels. The car began to skid after the wheels were turned. The front wheels did not take hold immediately, but the front wheels began to hold and the rear began to follow around. That the car went about four or five feet before the wheels took hold. The car pivoted on the front wheels and the rear swung around, and that the front wheels, after they had seemed to grab in the road, almost came to a stop with the rear end of the car pivoting around. On cross-examination (R. 195), the

witness stated he would not know exactly what was a hearing; that he didn't remember being put under oath; that he determined that appellee was fined when the latter asked his son or somebody to get the money from his pocketbook; that he didn't remember the amount of money and did not pay any attention to it. That he assumed his case was dismissed but he asked the officer. That at the time the appellee was in a special built seat or something that the Maryland Police car was equipped with. That at the time the police officer came on the scene, the machines were still in the same position as immediately following the accident.

Mr. Wallace L. Westcott (R. 201), testified that in October of 1936 he was employed as assistant service manager for appellant at Chester. That the driver for appellant turned in to him an accident report with a card that if you are not at fault in the accident you get the people involved in the accident to sign that and clear you, and that the card had been signed by someone, but that he could not say whose signature was on it. The paper signed by somebody was a paper with questions on it and the questions were printed. He testified as to the damages to the truck when he saw it, and that the trailer was 39 feet from the front bumper to the tail end of the trailer.

The appellee and his son testified as to the manner in which the accident took place and it is submitted that their testimony was entirely credible and substantial. Their evidence becomes logically persuasive when considered in the light of common knowledge that the driver of a vehicle rounding a curve to his right naturally and instinctively keeps closely to the right of the road whereas a driver of a vehicle rounding a curve to his left naturally tends to bear to his left hand side of the curve. Considering further the size of the tractor-trailer truck of 39 feet and the unusual width of such a vehicle, and considering the narrowness of the road of nine yards in width, it is difficult to believe

that the appellant's truck did not appropriate a part of the road on its left hand side to negotiate the turn.

The jury had the opportunity to see and to hear the witnesses and to determine for themselves whose testimony they believed to be credible. The court instructed the jury in a prayer allowed as to the burden of proof on the appellee and later in his charge advised the jury that they should not necessarily be persuaded by a larger number of witnesses to the accident but that the appellee still had to prove his case. The charge left the jury to determine the issue under instruction that they should consider the interest of witnesses in the case; their relationship to any party to the cause; the probabilities of their testimony and any contradictory statements made or any positions taken by them elsewhere than at the trial (R. 234). On the charge and instructions fully protecting the interests of the appellant, the jury found for appellee.

The unreliability of the driver's explanation of the accident can be seen in the following testimony: (R. 184, 185.)

By the Court:

Q. Was the plaintiff from your testimony, about half way between the right and the left side of the road, and also about half way through the intersection, before he started to make a turn? Is that your judgment about it?

A. That is about it, yes, sir. I thought he was going straight for a moment, straight across, and then, as he neared the center, very nearly the center of the intersection, he turned the wheel sharply to the right.

Thereafter, on cross-examination (R. 190):

Q. When the wheels did not take hold as the wheels were turned, the car was skidding in the meantime, was it not?

A. It begin to skid after the wheels were turned. The front wheels did not take hold immediately, but the front wheels begin to hold and the rear begin to follow around.

Later, his version was different, (R. 193) :

Q. What is your best judgment?

A. The best I can judge is that he had not reached, in my opinion, the center of the intersection before he started to slide.

It is respectfully submitted that the case on appeal comes squarely within the principle of law followed by this Court as to the verdict of the jury being conclusive.

Railroad Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531.

Pg. 37. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.

Chicago, R. I. & P. Ry. Co. v. Sharp, 63 Fed. 532.

Pg. 533. There was a conflict in the testimony as to some of these facts, but when an appellate court is asked to set aside the verdict of a jury in a common law action upon the facts, all conflict in the evidence must be resolved in favor of the party in whose favor the verdict was rendered. In other words, if, by giving credit to the plaintiff's evidence, and discrediting that of the defendant, the plaintiff's case is made out, the verdict must stand * * * and in this case, as has frequently occurred in other cases of like character, we are pressed to weigh conflicting evidence, pass upon the veracity of the witnesses and determine the case according to what we think is the weight of evidence appearing in the record. To do these things would be a flagrant invasion of the function of the jury, and a denial to the plaintiff of his constitutional right to have the facts of his case tried by a jury.

Andur v. Jacobson, 57 App. D. C. 181, 18 F. (2d) 831.

Pg. 182. The jury resolved the issues in favor of the defendant. There being no issue of law left to determine, the finding of the jury upon the facts is conclusive.

Also, *Robertson v. Washington Ry. and Electric Co.*, 51 App. D. C. 311, 279 F. 180; *Costinett v. Plaza Hotel Co.*, 41 App. D. C. 80; *Lockwood v. Rucker*, 40 App. D. C. 422; *American Ice Co. v. Moorehead*, 62 App. D. C., 66 F. (2d) 792; *In re Will of Hoover*, 8 Mackey (19 D. C.) 495; *Parsons v. Bedford*, et al., 3 Pet. 433.

Conclusion.

It is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted:

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